

**IN THE  
SUPREME COURT  
OF THE UNITED STATES**

October Term, 1975

No. 75-804

RICHARD T. HILL,

Petitioner-Respondent,

vs.

UNITED BROTHERHOOD OF  
CARPENTERS AND JOINERS  
OF AMERICA, LOCAL 25,  
et al.,

Defendants-Appellants.

---

**PETITION FOR WRIT OF CERTIORARI  
TO THE COURT OF APPEAL  
OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT**

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Supreme Court, U. S.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Richard T. Hill, respectfully  
prays that a Writ of Certiorari issue to review  
the judgment of the Court of Appeal of the State  
of California, Second Appellate District, in the  
case of Hill v. United Brotherhood of Car. &  
Join. of A., Loc. 25 (1975) 49 Cal. App. 3rd  
614, 122 Cal. Rptr. 722.

## OPINION BELOW

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The opinion of the Court of Appeal is reproduced in Appendix A.

## JURISDICTION

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The judgment of the Court of Appeal was entered on June 30, 1975. (See Appendix A.) A timely petition for hearing in the California Supreme Court was denied without opinion on September 10, 1975. (See Appendix B.) This Petition for Certiorari is filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U. S. C. §1257(3).

## QUESTION PRESENTED

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At issue herein is whether a union member who is subjected to protracted and intentional infliction of grievous emotional distress by officials of his union in pursuance of a vicious personal vendetta and in clear violation of state tort law may bring an action in state court for damages for redress of the injury done him, or

whether such action should be deemed preempted by the Labor Management Relations Act of 1947 (29 U. S. C. §§141, et seq.), which does not address itself to such tortious misconduct, and the subject matter of the action deemed within the exclusive jurisdiction of the National Labor Relations Board, which lacks the power to provide effective redress.

## STATUTORY PROVISIONS INVOLVED

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The statutory provisions involved herein are Sections 7 and 8 of the Labor Management Relations Act. These are set out in pertinent part in Appendix C.

## STATEMENT OF THE CASE

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### A. Factual Background

---

Plaintiff and Petitioner Richard T. Hill was at all relevant times a carpenter by trade. (RT 472.) At all relevant times, he has belonged to Defendant and Respondent Local 25 of the United Brotherhood of Carpenters and Joiners of

America. (RT 473.)<sup>1/</sup>

In 1965, Petitioner was elected to a three-year term as vice-president of Local 25. (RT 473-474.) In the course of the performance of his official duties, Petitioner came increasingly into conflict with one of the Local's business agents, Defendant and Respondent E. G. "Blackie" Daley, who, though only one of three business agents for the Local, held effective control of the Local's affairs. (RT 475, 1684, 1900-1901.)

Petitioner disagreed with Daley on a number of subjects, including rules governing dispatch of workers from the Local's hiring hall, the propriety of loans made by the Local's credit union and the use or misuse of union funds. (RT 484-486, 495-496, 498-501.) By the end of 1966 Petitioner and Daley had become openly hostile. (RT 809-810, 1520, 1554.) In early 1967, Petitioner incurred Daley's further displeasure by filing intra-union charges against Daley for misuse of union funds. (RT 587-588.) Somewhat later, Petitioner decided to run for the office of Local President in the 1968 election, and to oppose Daley's re-election as business agent. He so informed Daley. (RT 666.)

<sup>1/</sup>

References to the Reporter's Transcript will be made herein by the letters "RT," followed by page numbers. References to the Clerk's Transcript will be made by the letters "CT," followed by page numbers.

Petitioner's opposition to Daley and to Daley's policies triggered a campaign of intimidation directed at Petitioner (and sometimes at those seen associating with him) by Daley and those effectively under Daley's control. This campaign, which began in late 1966, took the form of numerous and continuing threats of starvation, frequent public ridicule, incessant verbal abuse, most of it profane, and, on at least one occasion, actual battery. (RT 492, 505, 528-529, 533, 591-593, 1063-1066, 1556-1560, 1598, 1664, 1670, 1685-1686.) More significantly, it involved refusal to dispatch Petitioner from the Local's hiring hall to any but the briefest and least desirable jobs, in violation of express intra-union rules and provisions of the union-management agreement governing the operation of the hiring hall and in contravention of long-established hiring hall practices. (RT 249-269, 320-323, 374, 407-408, 429, 440, 539, 1121, 1166-1167, 1197-1198, 1362-1363, 1436, 2625-2630; Ex. 3.)

The record establishes that Daley and other Local officials under his control went to extraordinary lengths to prevent Petitioner from obtaining his proper share of work for the express purpose of driving Petitioner from the Local. (RT 529, 533, 1558-1560, 1664.) Daley and his subordinates falsified union records to justify removing Petitioner from the top of the Local's out-of-work list and placing him at the bottom, thereby causing weeks of unemployment. (RT 507, 881-882, 1230-1231,



1246, 1444, 2639-2658; Ex. Q.) They deliberately offered him jobs for which he was not qualified and used his refusal of such jobs as a pretext for placing him at the end of the out-of-work list and effectively out of work for periods of weeks. (RT 507-510, 637-640, 656-660, 2157, 2164-2166.) They dispatched Petitioner to jobs of short duration, jobs which he would have had a right to refuse without penalty, but of whose short duration he was told nothing, even though the usual practice was to tell the affected member of that fact before he accepted such a dispatch. They then used his acceptance of employment of short duration (2 or 3 days) as the basis for moving his name to the bottom of the list. At the same time, others under Hill were receiving dispatches of several months' duration. (RT 263, 623-624, 636, 647, 1121, 1196-1198, 1362-1363, 1436.) On one occasion, they even dispatched him to a job that did not exist, effectively preventing him from obtaining one of several good dispatches that day. (RT. 642-646; see also 636-640, 2157, 2164-2166, 2173, 2658; Ex. 83.)

Unable to secure a job through ordinary hiring hall dispatching procedures, Petitioner approached potential employers in an attempt to get them to request the hiring hall to dispatch him, a permitted and not uncommon practice for out-of-work carpenters. One employer did specifically request Petitioner's dispatch, but Local officials, in violation of hiring hall rules, refused to dispatch Petitioner. (RT 539-559, 572-576, 1505-1508.)

Daley on one occasion also used Petitioner's refusal of a job for which he was not qualified as an excuse to report to the Department of Employment that Petitioner was unavailable for work, thereby causing Petitioner's unemployment benefits to be cut off pending the Department's review of the matter. It was unprecedented for any such refusal to be reported to the Department of Employment in that fashion. (RT 472, 507-518, 1561-1562.)<sup>2/</sup>

Petitioner's attempts to secure redress of the misconduct of Daley and the other officials under his control brought him scant relief. Petitioner complained to the National Labor Relations Board in May of 1967 about the Local's refusal to dispatch him in response to the specific employer request and was awarded some \$2500 in lost wages. (RT 671, 2683-2685.)<sup>3/</sup> Far from

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<sup>2/</sup> Petitioner's benefits for the affected period were later paid him. (RT 893.)

<sup>3/</sup> The Court of Appeal correctly noted that this was not the only occasion on which Petitioner went to the Board. (Appendix A.) The record provides no support, however, for the Court's apparent belief that there were several further charges filed or that any of them concerned job referral discrimination. The record reveals only that one additional charge was filed and later withdrawn. It does not disclose the nature of that charge. (RT 2686-2691.)



detering the misconduct of Daley, however, the charges and the award provoked an even more intense course of threats and intimidation. (RT 675.)

Petitioner also sought redress from the Los Angeles District Council of the United Brotherhood of Carpenters and Joiners, also a Defendant and Respondent herein, several times complaining to it of his mistreatment at Daley's hands. The District Council in each instance refused to do anything in response to Petitioner's entreaties. (RT 579-582, 593-599; Ex. 9, 11, 12.)

Through the efforts of Daley and those under his control, Petitioner remained unemployed, except for jobs of brief duration, from early 1967 until mid-1968. (RT 616-624, 2477-2478.) During this time, he was forced to subsist on unemployment benefits, disability benefits and \$2200 in savings bonds which he had accumulated over the years. (RT 576, 609-611; Ex. 9.) The frustration of forced idleness, the continuing erosion of his savings and the effects of the open hostility of Daley and other officials loyal to Daley soon took their toll on Petitioner's health. The nervous stress engendered by the campaign of intimidation and job discrimination caused Petitioner to suffer headaches, dizziness and gastrointestinal distress. (RT 534-536.) Petitioner had little desire to eat or drink and lost 40 pounds during the period. (RT 540, 576.) Petitioner was hospitalized in April of 1967 for tests, but no organic cause was found for his

symptoms, his doctor determining that the symptoms resulted from his employment problems and his conflict with Daley. (RT 535-538, 575-576, 1732, 1747-1758, 1763-1766.) Petitioner was unable to work and under a doctor's care from early April of 1967 until May, and again from later in May until December of 1967. (RT 538, 574-576, 616.)

Daley's attempts to drive or starve Petitioner out of Local 25 continued until mid-1968. As he had earlier warned Daley, Petitioner did run for the presidency of the Local in 1968 and campaigned actively against Daley when the latter sought re-election as Local business agent. (RT 669.) Petitioner was narrowly defeated, but Daley was also defeated and Petitioner's two-year ordeal came finally to an end. (RT 667-670.)

#### B. Procedural Background

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On April 17, 1969, Petitioner filed this action for damages against the United Brotherhood of Carpenters and Joiners, against Local 25 and the District Council, and against Local Business Agent E. G. Daley and certain other officials of Local 25 in the Superior Court for the County of Los Angeles in Los Angeles, California. The relevant pleading herein is Petitioner's First Amended Complaint, which contains four causes of action. The first cause

of action substantially pleaded a breach of the union's duty of fair representation. The second pleaded intentional infliction of emotional distress. The third pleaded fraudulent misrepresentation. The fourth pleaded breach of contract. (CT 102-114.) The Defendants demurred to all causes of action (CT 127-128) and their demurrer was sustained as to the first, third and fourth causes of action, without leave to amend. (CT. 190.) The basis of this ruling was that the subject matter of these causes of action was preempted by the Labor Management Relations Act.

Petitioner's action went to trial on the single remaining cause of action for intentional infliction of emotional distress. (RT 1.) On February 5, 1973, pursuant to a jury verdict, judgment was rendered on that remaining cause of action against Daley, Local 25 and the District Council in the amount of \$7500 in compensatory damages and \$175,000 in punitive damages. (CT 570-572.)<sup>4/</sup> All three appealed from the judgment (CT 645) and the Court of Appeal of the State of California, Second Appellate District, in a published opinion authored by Justice pro tempore Charles Loring, reversed. Although Respondents made a number of assignments of

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Judgment was never entered with respect to the other causes of action. Their present status is a matter of continuing dispute, but that fact does not affect this Petition.

error, the sole basis for that reversal was that Petitioner's action was preempted by the Labor Management Relations Act. (See Appendix A.)

A timely petition for hearing in the Supreme Court of the State of California was denied on September 10, 1975. (See Appendix B.)

## REASONS FOR GRANTING THE WRIT

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### A. Preliminary Statement

---

Petitioner submits that the doctrine of preemption has been misapplied in this case, and that his substantial rights have been needlessly sacrificed in order to avoid an essentially imaginary conflict between federal labor law and California's law of torts.

If the decision below in fact represents a correct application of the preemption doctrine as it now exists, Petitioner submits that serious reconsideration of that doctrine is in order. Indeed, the preemption doctrine as it has developed in the law of labor relations is unclear, uncertain in its application, frequently productive of manifest injustices, and but poorly promotive of the purposes it is intended to serve. The instant action, if in fact it is preempted, illustrates as



well as any case could the deficiencies of the principle as it is now formulated.

B. Purpose and Scope of the Labor Management Relations Act

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The basic purpose of the Labor Management Relations Act of 1947 was and is to establish an orderly process for employee self-organization and for the initiation and maintenance of collective bargaining between organized employees and their employers, thus eliminating the chief sources of the industrial strife and unrest which had characterized the period preceding legal recognition of the labor movement. (29 U. S. C. §§141, 151.) In light of the Act's manifest purpose, it is hardly surprising that those provisions of the Act which regulate the behavior of the parties to the process focus almost exclusively on conduct which impinges on that process and only incidentally, if at all, on conduct which does not. (29 U. S. C. §§157, 158.)

C. The Preemption Principle

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1. The doctrine of preemption as it is applied in the law of labor relations is in actuality a marriage of two separate but somewhat

similar concepts.

a. On one hand, the doctrine is an application of the traditional principle of preemption. Congressional power over labor relations stems from the interstate commerce clause of the Constitution (U.S. Const. Art. 1, §8; NLRB v. Jones & Laughlin Steel Corp. (1937) 301 U. S. 1, 57 S. Ct. 615, 81 L. Ed. 893). The term preemption suggests federal displacement of state power over interstate commerce, and thus over labor relations, in one of two ways. First, as indicated in Cooley v. Board of Wardens (1851) 53 U. S. (12 How.) 299, 319-32, 13 L. Ed. 996, some aspects of interstate commerce are so demanding of uniform national regulation that their regulation, if any, must be by a single authority, and under the supremacy clause (U. S. Const. Art. 6) that authority can only be Congress. Second, where the states are not preempted by the bare constitutional grant of power to Congress, state power may still be displaced by legislation which, through the supremacy clause, preempts some or all of the field. (See Note, Federal Preemption in Labor Relations (1968) 63 Nw. U. L. Rev. 128, 129-130.) Labor relations is not one of the aspects of interstate commerce deemed directly foreclosed to the states by the Constitution, and to the extent that the states are preempted this is the result of Congress' enactment of national labor legislation. (Ibid.) For this reason, application of the doctrine in the area of labor relations law involves defining the scope of permissible state activity in light of the objectives sought to be promoted by the federal legislation.

b. On the other hand, the preemption doctrine as applied to labor relations law also embraces a principle of primary jurisdiction, the Congress having vested the National Labor Relations Board with the sole authority to interpret and enforce the exclusively federal law of labor relations, subject only to limited review by the courts. (29 U. S. C. §160; Bryson, A Matter of Wooden Logic: Labor Law Preemption and Individual Rights (1973) 51 Tex. L. Rev. 1037, 1038-1039.) The principle of primary jurisdiction rests on essentially the same foundation as true preemption: To confer concurrent jurisdiction upon the courts risks fragmentation, inconsistency and conflict where a unitary policy is desirable or necessary. (See Garner v. Teamsters Local 776 (1953) 346 U. S. 485, 490-91, 74 S. Ct. 161, 98 L. Ed. 228; see also Cox, Labor Law Preemption Revisited (1972) 85 Harv. L. Rev. 1337, 1341-1345.)

2. In its earlier decisions, this Court struggled to apply the preemption doctrine so as to balance the need for a uniform scheme of labor relations against (1) the interest of the states in regulating some conduct which was neither protected nor prohibited by federal labor relations law (see United Automobile Workers v. Wisconsin Employment Relations Board (1949) 336 U. S. 245, 69 S. Ct. 516, 93 L. Ed. 651) and, indeed, even some conduct actually regulated by federal law, at least where the conduct was prohibited and where the remedies under state law were different from federal remedies (Weber v. Anheuser-Busch, Inc. (1955) 348 U. S. 468,

75 S. Ct. 480, 99 L. Ed. 546; United Construction Workers v. Laburnum Construction Corp. (1954) 347 U. S. 656, 74 S. Ct. 883, 89 L. Ed. 1025; cf. Garner v. Teamsters Local 776, *supra*, 346 U. S. 485, 74 S. Ct. 161, 98 L. Ed. 228) and (2) the right of individuals involved in the collective bargaining process to seek judicial redress for injuries which resulted from conduct lying outside the Labor Board's primary area of responsibility and for which federal law provided inadequate remedies (International Association of Machinists v. Gonzales (1958) 356 U. S. 617, 78 S. Ct. 923, 2 L. Ed. 2d 1018.)

These early efforts, while usually unexceptionable in terms of results, failed to produce a single, simple and universally applicable preemption test, and ultimately, in San Diego Building Trades Council v. Garmon (1959) 359 U. S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 775, this Court essayed a much more sweeping formulation of the preemption doctrine, evidently hoping thereby to enable the lower courts to police the uneasy frontiers between federal and state power and between judicial and administrative jurisdiction without the need for constant supervision by this Court. (See Motor Coach Employees v. Lockridge (1971) 403 U. S. 274, 289-290, 91 S. Ct. 1909, 29 L. Ed. 2d 473.)

The Garmon test is indeed marvelously easy to state. Under that test, conduct actually or arguably subject to the Labor Management Relations Act -- that is, actually or arguably prohibited by Section 8 (29 U. S. C. §158) or actually or arguably protected by Section 7 (29 U. S. C. §157) --



may not be regulated by the states and lies within the exclusive jurisdiction of the Labor Board. Theoretically at least, the application of the test is marvelously simple, too. What determines whether a particular lawsuit is preempted under the Garmon principle is not the form of the action -- that is, whether it sounds in tort or in contract or whether it purports to depend on state law of general applicability instead of state law which attempts specifically to regulate labor relations --- but rather the nature of the conduct itself. If the "crux" of the lawsuit is conduct arguably subject to the Labor Management Relations Act and to the Board's jurisdiction, the courts are without power to entertain it. (Plumbers Union v. Borden (1963) 373 U. S. 690, 697-698, 83 S. Ct. 1423, 10 L. Ed. 638.)

#### D. Application of Principle

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It is not entirely clear that the Garmon principle requires preemption in this case.

This case is unlike the usual action against a union by a member in that the misconduct complained of was not a single act but rather embraced a series of acts of varying character occurring over a period of more than two years. This fact makes it somewhat more difficult to determine where the "crux" of the action lies than in the previous cases decided by this Court, but logically, the "crux" of the action should be determined

by examination of the overall character of the misconduct rather than isolated instances.

Examination of the overall character of the Respondents' misconduct reveals that although it occurred in a setting to which the Labor Management Relations Act applied, it had as its motive personal enmity and was not an attempt either to coerce an employee in the exercise of protected rights (29 U. S. C. §158 (b)(1)(A)) or to gain an unfair or illegal advantage in collective bargaining (29 U. S. C. §158(b)(4)).

To the extent that any of the misconduct complained of does come within the ambit of the Garmon principle, it does so in a way that involves the policies underlying the principle in the most peripheral way.

In the first place, Petitioner has not sought judicial interpretation or application of the provisions of the Labor Management Relations Act, so that the Labor Board's role as a primary arbiter of issues of national labor policy is not involved here. In the second place, Petitioner has not invoked a rule of state law aimed specifically at the regulation of labor relations, so that the problem of competing schemes of labor relations law is not involved here either. Thus, any conflict that may occur will be at most indirect.

Applying the Garmon test, it is clear that the misconduct in question is by no stretch of the imagination protected under Section 7 of the Labor

Management Relations Act, since Respondents were scarcely exercising the right of employees to engage in or to refrain from collective bargaining. If it were protected or even arguably protected there would exist the risk of an immediate and direct conflict between the standards of behavior prescribed by the act and applied by the Board and the standards of behavior by which Respondents' conduct was judged herein. To countenance any such conflict would unquestionably be to undermine the Labor Board's implementation of the national labor policy and in effect to Balkanize the law of labor relations.

Since Respondents' conduct was not protected under Section 7, the Garmon rule, if it does apply, applies because their conduct violated or arguably violated Section 8(b) of the Act, which proscribes as unfair labor practices coercion and discrimination by labor organizations which is intended to encourage or discourage the exercise of protected Section 7 rights.

If conduct clearly violates Section 8, to confer concurrent jurisdiction to regulate it upon the courts cannot give rise to the kind of head-on collision which renders intolerable judicial or state regulation of conduct protected under Section 7. The conflict in such situations is nothing more than a difference in remedies available from the respective tribunals.<sup>5/</sup>

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<sup>5/</sup>  
Garner v. Teamsters Local 776, supra, 346  
U. S. 485, 74 S. Ct. 161, 98 L. Ed. 2d 228,  
(con't p. 19)

An element of complication is added if the conduct is only arguably prohibited by Section 8. The evident intent of the "arguably prohibited" portion of the Garmon test is (1) to leave to the Labor Board, with its special expertise, the exclusive power to determine whether certain borderline varieties of conduct are helpful or harmful to the objectives of the Act and thus whether they should be prohibited or not, and (2) to allow the Board to protect conduct which it might prohibit by simply not regulating it. When conduct is arguably subject to Section 8 in this sense, a proper respect for the Labor Board's primary jurisdiction necessarily precludes interference by the courts.

But there is some conduct which may be arguably prohibited by Section 8 without there being any shadow of a doubt that if it is not in

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<sup>5/</sup> (con't)  
might seem to indicate a contrary view, but a basic concern there -- if not the basic concern -- was that if the courts as well as the Board were permitted to determine whether a particular instance of conduct was prohibited, there would exist a real danger of inconsistent adjudications, no matter how diligently the courts attempted to imitate the reasoning of the Board. (See also Cox, Labor Law Preemption Revisited (1972) 85 Harv. L. Rev. 1337, 1341-1345.) The kind of conduct referred to here is conduct as to the prohibited character of which reasonable men could not differ.



fact prohibited by the Act, it is still inimical to the Act's objectives and would be proscribed by the Board if it thought it had the power. The issue for the Board's determination in cases of this sort is whether in fact Section 8 gives it the authority to act at all, not whether (assuming the Board has the authority) it ought to act. There is in a very loose sense a conflict between the Board and a court when the court awards damages or other relief on account of conduct which the Board would prohibit if it could but which it has decided nor might decide it cannot reach. But this conflict is even more tangential and remote than the conflict in remedies which may occur when a court entertains a law suit founded upon clearly prohibited conduct.

The record herein reveals but one instance of clearly proscribed conduct, for which the Board did in fact provide a partial remedy. It reveals, additionally, a great many instances of misconduct by no means so easily characterized. To the extent that any of these remaining instances can properly be regarded as arguably subject to Section 8 there can be no question that they are arguably subject only in the second of the two senses just discussed; that is, that the only arguable issue is whether the Labor Board has the authority under Section 8 to prohibit them.

It might be added that just as the conduct in question is obviously not the kind of conduct to which Sections 7 and 8 are primarily addressed, so it is not the kind of conduct involved in Teamsters Local 20 v. Morton (1964) 377 U. S.

252, 84 S. Ct. 1253, 12 L. Ed. 2d 280. There this Court recognized that conduct clearly not subject to the Act might still lie outside the regulatory power of the states if Congress, in deliberating upon the Act, necessarily focussed on the conduct but in balancing the interests of employers, employees, unions and the public decided to leave it unregulated. Professor Archibald Cox denominates such conduct "permitted conduct" to differentiate it from conduct which the Board has the affirmative power to protect. (Cox, Labor Law Preemption Revisited (1972) 85 Harv. L. Rev. 1337; see also Lesnick, Preemption Reconsidered: The Apparent Reaffirmation of Garmon (1972) 72 Col. L. Rev. 469, 477-478.) It can hardly be contended that Congress, if it focussed on the kind of egregious misconduct involved here, could have intended that such misconduct go unredressed.

#### E. Applicable Exceptions

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The Garmon principle is subject to a number of exceptions.

So far as is relevant here, exceptions to the basic Garmon principle are recognized (1) where the conduct in question directly affects vital local interests traditionally left to state regulation or is only peripherally related to the central purpose of the Labor Management Relations Act (Linn v. Plant Guard Workers (1966)

383 U. S. 53, 86 S. Ct. 657, 15 L. Ed. 2d 582; Automobile Workers v. Russell (1958) 356 U. S. 634, 78 S. Ct. 932, 2 L. Ed. 2d 1030; International Association of Machinists v. Gonzales, supra, 356 U. S. 617, 78 S. Ct. 923, 2 L. Ed. 2d 1018; United Construction Workers v. Laborum Constructors Corp., supra, 347 U. S. 656, 74 S. Ct. 833, 89 L. Ed. 1025); (2) where an employer or union has breached its duties to a worker arising from or concerning a labor agreement (29 U. S. C. §185; Smith v. Evening News Association (1962) 371 U. S. 195, 83 S. Ct. 267, 9 L. Ed. 2d 246); (3) where, without respect to any breach of a labor agreement, a union has violated its duty to fairly represent its members (Vaca v. Sipes (1967) 386 U. S. 111, 87 S. Ct. 903, 17 L. Ed. 2d 842); and (4) where a union member has been subjected to union discipline without observance of minimal procedural safeguards (29 U. S. C. §§411(a)(5), 412; Hardeman v. International Brotherhood of Boilermakers (1971) 401 U. S. 233, 91 S. Ct. 609, 28 L. Ed. 10). In these situations, an action at law may be brought in a state or federal court even though the conduct in question is actually or arguably subject to the provisions of the Labor Management Relations Act and to the jurisdiction of the Labor Board.

As will be seen, the exception primarily applicable here is the first; but the others, although perhaps not directly applicable, indicate that the Congress and the courts have perceived definite limits to the necessity for avoiding all possible conflict between the Board's regulation

of labor management relations and judicial regulation of the relations between unions and their members.

1. The source of the first mentioned exception is the Garmon decision itself, this Court having there specifically exempted areas of vital local concern and areas of concern peripheral to the basic purposes of the national labor legislation from the operation of the rule. The Garmon court expressed this exception as follows:

"... When the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the State from acting. However, due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act. See International Assn. of Machinists v. Gonzales, 356 U.S. 617. Or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction,



we could not infer that Congress had deprived the State of the power to act." (359 U.S., 243-244.)

The primary application of this exception has been to situations involving actual or threatened public disorder (see Russell and Laburnum, supra), to disputes characterized as involving purely internal union affairs (see Gonzales), and to actions for libel occurring in the course of certification campaigns (see Linn, supra), but there is nothing in the cases to suggest that these were ever meant to be the only matters encompassed within the exception.

Indeed, much of this Court's discussion in the Linn case is of obvious general applicability, and in Linn may be discerned the outlines of a test for determining whether any tort claim arising under state law is preempted or not: If (a) the conduct in question does not ipso facto constitute an unfair labor practice (383 U. S., at p. 63), (b) the conduct affects compelling local interests (393 U. S., at pp. 63-64), (c) the National Labor Relations Board and the courts are concerned with separate and severable consequences of the conduct and the remedies they provide are mutually exclusive (383 U. S., at pp. 63-64), and (d) the conduct in question was motivated by actual malice and caused actual damage (383 U. S., at pp. 64-66), a tort action will lie, notwithstanding an incidental violation of the Labor Management Relations Act.

That test is more than satisfied here. The conduct involved here is not automatically an unfair labor practice; in fact, much of it is clearly not, and only a small part of it, if any, is even arguably an unfair labor practice. That California is vitally interested in the protection of its citizens -- including its workmen -- from the intentional infliction of emotional distress is manifested by the California Supreme Court's decision in Alcorn v. Anbro Engineering, Inc. (1970) 2 Cal. 3d 493, 86 Cal. Rptr. 88, 468 P. 2d 216, a case which arose in a labor context and which far more arguably involved an unfair labor practice than does this case. (See 29 U. S. C. §§158(a)(1) and (3).) The Labor Management Relations Act is essentially unconcerned with the impact of such misconduct upon the individual, or with conduct undertaken from motives unrelated to the bargaining process. This is apparent from its failure to provide any remedy whatever for the kind of harm done the individual by such misconduct, the Labor Board having the power at most to award lost wages to a worker who suffers mistreatment at the hands of his union. California's law of torts requires outrageous conduct and grievous emotional distress to be shown to establish the tort here in question, a burden considerably heavier than the showing of mere actual malice or actual damage required under Linn (383 U. S. at pp. 64-66).

As already noted, also included within Garmon's exemption of matters of peripheral federal concern are disputes involving purely internal union affairs. The primary example of

this branch of the exception is International Association of Machinists v. Gonzales, supra, in which a member's action in state court for damages (including damages for physical and mental suffering) and for reinstatement following expulsion from his union was held not preempted by the Labor Management Relations Act. Petitioner submits that the bulk of the misconduct in this case falls squarely within this branch of the exception.

Respondents argued below, however, and the Court of Appeal was persuaded, that Petitioner's cause of action for infliction of emotional distress was governed by Motor Coach Employees v. Lockridge, supra, 403 U. S. 274, 91 S. Ct. 1909, 29 L. Ed. 2d 473, Plumbers Union v. Borden, supra, 373 U. S. 690, 83 S. Ct. 1423, 10 L. Ed. 2d 638, and Iron Workers Union v. Perko (1963) 373 U. S. 701, 83 S. Ct. 1429, 10 L. Ed. 2d 646, rather than by this exception. In Perko, Borden, and Lockridge, the acts complained of involved direct interference with existing employment relations or with employment relations about to be entered into. In Lockridge, this Court pin-pointed such active interference as the feature which distinguished Lockridge, Borden and Perko from Gonzales. (403 U. S., at pp. 295-296.)<sup>6/</sup> Respondents (App. Op. Br.,

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To what extent Borden, Perko and Lockridge have impaired the vitality of Gonzales, one can only conjecture. (See dissenting opinions of  
(con't. p. 27)

pp. 34-44) and the Court of Appeal (Appendix A, pp. 21-24) reasoned that since one of the many instances of misconduct herein was the Union's refusal to dispatch Petitioner in response to an employer request, and since a large portion of the remaining instances of misconduct involved hiring hall discrimination, this case was indistinguishable from Borden, Perko and Lockridge.

6/ (con't)

Justices Douglas and White in Lockridge, 403 U. S., at 308 et seq.; Cox, Labor Law Preemption Revisited (1972) 85 Harv. L. Rev. 1337, 1375-1376; Note, Preemption of the Nonviolent Torts in the Labor Field: Formulation of Standards in the Supreme Court and in State Courts (1968) 48 Bost. U. L. Rev. 83, 94 et seq.) On one hand, Borden, Perko and Lockridge might be read as confining Gonzales actions to those for reinstatement only, with even incidental awards of back pay precluded. On the other hand, Borden, Perko and Lockridge may stand for the more limited proposition that only where the "crux" of the action is interference with employment relations, rather than status in the union, is Gonzales inapplicable. Logically it would seem that if the subject matter of the action is in fact of peripheral federal concern, the policy of avoiding multiple proceedings would favor an action for all appropriate relief, even if legal and administrative remedies to some extent overlapped.



It is not altogether clear why such talismanic significance should be attached to the distinction between misconduct which interferes with the employment relation and misconduct which does not. A union may as easily restrain or coerce a member in the exercise of protected rights without at all affecting his employment status as by tampering with his job rights or by causing the member's employer to coerce him, and the former variety of coercion is no less illegal than the latter (29 U.S.C. §§158(a)(1) (A), 158(b)(2).)

In any event, nothing in Borden, Perko or Lockridge justifies extending the purported principle that interference with existing or prospective employment removes a case from the operation of Gonzales to cases touching on employment or the hiring hall in only the most remote or tangential way. Two of the mentioned cases (Perko and Lockridge) involved a single act directly affecting a job already possessed by the employee involved, and one (Borden) involved a single refusal to refer a union member to a job actually promised to him. It was this easy in those cases to characterize the "crux" of the action as interference with actual or prospective employment relations, an arguable violation of Section 8(b)(1)(A) or 8(b)(2). Here, by contrast, only one instance of misconduct concerned actual or promised employment and that instance constituted but a small or incidental part of a much larger pattern of oppression. Continuing refusal to dispatch Hill from the hiring hall formed a considerably greater part of the vindictive

campaign to drive Hill from the Union. That misconduct obviously did not involve actual or existing employment and it cannot be said to involve even prospective employment in anything like the sense that Borden did. Rather, the overall effect of the Respondents' hiring hall abuses was more nearly akin to outright expulsion from the union, bringing the case within Gonzales.

Moreover, the Borden, Lockridge and Perko decisions are distinguishable on a further basis. Each involved, in addition to actual interference with employment relations, an issue which might be regarded as particularly within the expertise of the National Labor Relations Board. In Lockridge, where the member involved was expelled from his union for nonpayment of dues and was thereafter fired from his job under a union security clause in the labor agreement between his union and his employer, the issue was the construction of the union security clause, a matter within the jurisdiction of the Board under Sections 8(a)(3) and 8(b)(2) of the Labor Management Relations Act (29 U. S. C. §§158(a)(3), 158(b)(2)). (See, however, Cox, Labor Law Preemption Revisited (1972) 85 Harv. L. Rev. 1337, 1370-1371, 1376.) In Perko, the further issue was whether the supervisory employee the union caused to be fired was an "employee" within the meaning of Section 2(3) of the Labor-Management Relations Act (29 U. S. C. §152(3)). In Borden, the additional factor was that the member involved appeared to have breached a union rule against soliciting jobs from prospective employers instead of awaiting

job referrals from the union hall. Arguably at issue was whether that rule was or was not consonant with national labor policy as expressed in Sections 7 and 8 of the Act. Here, by contrast, there were no such additional issues.

2. The three causes of action to which Respondents' demurrer was sustained in the trial court were attempts to invoke some of the other exceptions set out above. Those causes of action and the various other exceptions are not before this Court in any direct sense, but the other exceptions do merit consideration here because they illustrate to what extent the courts, applying other bodies of law, have been permitted to encroach upon the supposedly sacrosanct domain of the Board and the Labor Management Relations Act, and thus by implication what kinds of conduct have been determined to be of only peripheral concern to the scheme of labor relations regulation embodied in the Act. Petitioner therefore submits that whatever the form in which his action is cast, if the misconduct complained of falls within one or more of these other exceptions, his action ought not to be deemed preempted.

a. The concept of a union's duty to fairly represent its members is a broad one. It is in essence the responsibility of a union selected as a bargaining agent by employees to discharge its agency by representing the interests

of each employee fairly and making a genuine effort to serve the interests of all its members, without hostility and in complete good faith and honesty. (Humphrey v. Moore (1964) 375 U. S. 335, 342, 84 S. Ct. 363, 11 L. Ed. 2d 370; Ford Motor Co. v. Hoffman (1952) 345 U. S. 330, 337-338, 73 S. Ct. 681, 97 L. Ed. 1048.)

The issue of breach of the duty of fair representation may arise either in the context of a suit under Section 301 of the Labor Management Relations Act (29 U. S. C. §185) for breach of a labor agreement (Vaca v. Sipes, supra, 386 U. S. 171, 87 S. Ct. 903, 17 L. Ed. 2d 842; Richardson v. Communications Workers of America (8th Cir. 1971) 443 F. 2d 974) or in a suit involving no such contractual breach (Vaca v. Sipes, supra, as characterized in Motor Coach Employees v. Lockridge, supra, 403 U. S. 274, 299, 91 S. Ct. 1909, 29 L. Ed. 2d 473; Smith v. Sheet Metal Workers (5th Cir., 1974) \_\_\_ F. 2d \_\_\_, 87 LRRM 2211; Retana v. Apartment, Motel, etc. (9th Cir. 1972) 453 F. 2d 1018). Such actions for breach of the duty of fair representation lie outside the scope of the preemption doctrine and may be brought in either state or federal courts. (Arnold v. Carpenters' District Council (1974) 417 U. S. 12, 40 L. Ed. 2d 620, 94 S. Ct. 2069; Vaca v. Sipes, supra, 386 U. S. at pp. 181-187.)

Here, Section 204.1 of the Master Labor Agreement between the District Council and the involved employers provided for "open and non-discriminatory employment lists for the use of



workmen desiring employment on work covered by this Agreement" [Exhibit 32]. A Section 301 action would therefore clearly lie. Moreover, breach of the Master Agreement to the side, there can be no question that Respondents' hostile, malicious and abusive conduct toward Petitioner fell far below the standard of fair, honest, good faith and impartial treatment Petitioner deserved at Respondents' hands.

b. Under Section 101(a)(5) of the Labor-Management Reporting and Disclosure Act of 1959 (29 U. S. C. §411) (a)(5), a union member may not be disciplined by his union without first being served with written specific charges, given a reasonable time to prepare his defense and afforded a full and fair hearing. Under Section 102 of the Act (29 U. S. C. §412), a union member who is disciplined in disregard of Section 101(a)(5) may sue his union. Such actions are exempted from the Garmon rule. (Hardeman v. International Brotherhood of Boilermakers (1971) 401 U. S. 233, 28 L. Ed. 2d 10, 91 S. Ct. 609.)

It is more than merely arguable that the campaign of harrassment, intimidation and referral discrimination pursued by business agent Daley and others under his control was a form of informal discipline imposed on Petitioner for his failure to fall in line with Daley and his policies. Indeed, the thrust of much of the defense offered by Respondents at trial was that their outrageous conduct toward Petitioner was justified because Petitioner was making matters

very difficult for Daley and his friends, and because he sometimes caused trouble on the jobs to which he was dispatched. There is no evidence in the record of any attempt whatever to satisfy the procedural standards set out in Section 101(a)(5).

#### F. Reexamination of Garmon

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No one who has had to struggle with the preemptive doctrine as it has developed in the area of labor relations law can avoid concluding that the Garmon principle, for all its claimed simplicity and universality, suffers serious failings as a rule of law, failings which have led to widespread criticism of the principle. (See e. g. Cox, Labor Law Preemption Revisited (1972) 85 Harv. L. Rev. 1337; Bryson, A Matter of Wooden Logic: Labor Law Preemption and Individual Rights (1973) 51 Tex. L. Rev. 1037; Lesnick, Preemption Reconsidered: The Apparent Reaffirmation of Gorman (1972) 72 Col. L. Rev. 469; Hooton, The Exceptional Garmon Doctrine (1975) 26 Lab. Law J. 49; Note, Preemption of State Labor Regulations Collaterally in Conflict with the National Labor Relations Act (1968) 37 G. Wash. L. Rev. 132; Michelman, State Power to Govern Concerted Employee Activities (1961) 74 Harv. L. Rev. 641.

In the kind of situation presented by the Garmon case (which involved an award of damages

to an employer by a state court under state tort law for a union's use of arguably protected economic weapons in a collective bargaining dispute with the employer), the Garmon principle is indeed easy to apply and produces an unquestionably proper result.

But when the Garmon principle has been applied to fundamentally different situations, involving not the relationship between employer and union, but the relationship between union and union member (see Lockridge, Borden and Perko) it has tended to yield results which are difficult to justify in terms of fundamental fairness (the Labor Board has unreviewable discretion to refuse even a clear case, and if it does, the individual is wholly without a remedy) and results which are only marginally promotive of the purposes of the preemption doctrine (state regulation of conduct largely unrelated to employee self-organization and collective bargaining scarcely hampers implementation of the national labor policy).

In addition, the Garmon principle has lost much of its original simplicity, in part because of the development, already adverted to, of a number of judicial and legislative exceptions to the basic principle (see dissenting opinion of Mr. Justice White in Motor Coach Employees v. Lockridge, supra, 403 U. S. at 309; Bryson, A Matter of Wooden Logic: Labor Law Preemption and individual Rights (1973) 51 Tex. L. Rev. 1037, 1040-1041; Hooton, The Exceptional Garmon Doctrine (1975) Lab. L. J. 49) and in

part because of the valiant but largely unsuccessful attempts of this Court to square some of the later cases (see Borden, Perko and Lockridge, supra) with the pre-Garmon decisions (see Gonzales, Laburnum and Russell, supra), which embodied different and probably irreconcilable concepts of preemption, but which the Court was nonetheless unwilling to overrule.

And finally, the most attractive of the claimed attributes of Garmon -- that its ostensibly simple formula provides a rule of decision for all cases -- has been exposed as illusory by this Court's decision in Teamsters Local 20 v. Morton, supra, 377 U. S. 252, 84 S. Ct. 1253, 12 L. Ed. 2d 280. Under Morton, it will be recalled, conduct which is clearly neither protected nor prohibited by the Act may still be foreclosed to regulation by the states if Congress focussed on such conduct but declined to prohibit it, at least where leaving such conduct unregulated was part of the balance Congress struck between the conflicting interests of unions, employers, employees and the public.

In an excellent recent review of the doctrine of preemption as it has developed in the area of labor relations law, Professor Archibald Cox has suggested that a far more satisfactory way of analyzing and resolving preemption issues than the Garmon principle is the principle enunciated in Morton. (Cox, Labor Law Preemption Revisited (1972) 85 Harv. L. Rev. 1337.)



Professor Cox argues that since the national labor legislation was enacted against a backdrop of local laws creating rights of property, bodily security and personality and preserving public order, health and welfare -- laws which apply to everyone regardless of his involvement or non-involvement in collective bargaining -- the relevant inquiry where a rule of local law is invoked in a dispute arising in the collective bargaining context is not whether such rule might impinge indirectly on the federal scheme of labor relations regulations. Rather, the question is whether (assuming always that the conduct under scrutiny is not actually protected) the local law or rule of decision is based upon an accommodation of the special interests of employers, unions, employees and the public in the collective bargaining process, an accommodation of the sort already made by the Congress in enacting the Labor Management Relations Act. Professor Cox would bar state regulation where the state seeks to reach its own resolution of such conflicting interests, but not otherwise. (Cox, op. cit., pp. 1356-1357.)

Under the Morton approach, Professor Cox points out, Lockridge (although perhaps not Borden and Perko)<sup>7/</sup> should have been decided

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7/

Cox believes the ability of the Board to provide a substantially adequate remedy in Borden and Perko warrants continuing adherence to the results there reached. (Cox, op. cit., p. 1376, (con't p. 36)

differently. In Cox's view, a dispute between a union member and his union lies largely outside the basic focus of the Labor Management Relations Act, and even if there is some slight possibility of a different result if such a dispute is heard by a court instead of the Board, or some difference between the remedies available from a court and those available from the Board, there will seldom be any noticeable effect on the balance of power between employer and union. Such possibilities of conflict or inconsistency as may arise are to Professor Cox preferable to complete denial of any remedy (as occurs when the courts are precluded by Garmon from acting and the Board declines to act), as well as to the need for dual proceedings in cases where a union member fired from his job because of wrongful expulsion from his union must seek back pay from the Board but can obtain reinstatement in the union only through a lawsuit (an inevitable consequence of Lockridge). (Cox, op. cit., pp. 1368 et seq.)

Professor Cox's analysis is compelling. His proposal to expand the Morton principle preserves for Board regulation precisely that sphere of activity Congress intended the Board

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7/ (con't)

Here, of course, the Board is utterly without power to award compensation for the harm suffered, just as in Lockridge it was without the power to cause the expelled member's reinstatement in his union.

to oversee, but it largely eliminates the egregious injustice which results when the Board is not empowered to provide an adequate remedy or when the Board declines jurisdiction of a case which the courts are precluded from touching because the Board arguably might act if it wished. And because it encompasses not only union-employer but union-member disputes, it provides a test comprehensive enough to properly resolve all preemption cases, as the Garmon rule cannot.

Obviously, if Lockridge was wrongly decided under Professor Cox's Morton approach, so too was this case. Indeed, the possibility of any significant conflict between the enforcement of California's law of torts and the effectuation of a unitary national labor policy is even more remote here than the largely imaginary conflict in Lockridge, there being nothing in this case which requires the expertise of the Labor Board.

## CONCLUSION

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The fundamental issue in this case is whether, by reason of an unnecessarily hyper-technical application, the doctrine of preemption is to be allowed to become the primary refuge of any labor official who wishes to behave like a scoundrel. Conduct whose main purpose is to harm and injure another, as was Business Agent Daley's, is by no stretch of the imagination protected by national labor policy. To the extent that such conduct is prohibited by the Labor Management Relations Act, the Act's limited concern is its adverse impact on the maintenance of industrial peace through collective bargaining, rather than its effect upon the immediate victim. This limited concern is reflected in the very limited remedial powers afforded the National Labor Relations Board. Personal vendettas, even those which have their genesis in labor disputes and which may be pursued in an industrial setting, are outside the purview of the Labor Management Relations Act and certainly outside the special expertise of the Board. As this case itself illustrates, such vendettas, fueled as they are by passions which go far beyond the largely economic motivations assumed by the Act, are scarcely likely to be deterred by the pin-prick remedial measures available to the Board, measures which are only minimally adequate for their primary intended purpose and largely inadequate to make whole the hapless victims of the kind of outrageous misconduct involved here.



Viewed from a practical standpoint, the possibility of any real conflict between the accomplishment of the objectives of the Act and the effectuation of the policies underlying California's law of torts is remote indeed, and the process of employee self-organization and collective bargaining would be entirely unaffected by the affirmance of the judgment herein. To sacrifice the substantial interests of Petitioner, and those situated as he is, in order to avoid so insubstantial and hypothetical a conflict would be a gross injustice indeed.

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeal.

Respectfully submitted,

G. DANA HOBART  
GERALD KANE

Attorneys for Petitioner

## APPENDIX

APPENDIX A  
IN THE COURT OF APPEAL  
OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION FIVE

RICHARD T. HILL,	)	
	)	2nd Civ. No.
Plaintiff and	)	43751
Respondent,	)	
	)	Sup. Crt. No.
vs.	)	951866
	)	
UNITED BROTHERHOOD	)	Court of Appeal
OF CARPENTERS AND	)	Second District
JOINERS OF AMERICA,	)	
LOCAL 25, et al.,	)	FILED
	)	Jun 30 1975
Defendants and	)	Clerk
Appellants.	)	
	)	Dpty. Clrk.

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert W. Kenny, Judge. Reversed.

Geffner & Satzman, Howard Rosen and Leo Geffner, for Defendants and Appellants.

Coleman, Silverstein & Hobart, for Plaintiff and Respondent.

Charles P. Scully and Donald C. Carroll, attorneys for Amicus Curiae California Labor Federation, AFL-CIO.

Van Bourg, Allen Weinberg, Williams & Roger, Victor J. Van Bourg and David A. Rosenfeld, attorneys for Amicus Curiae.

Richard T. Hill (Hill) filed a first amended complaint for damages against United Brotherhood of Carpenters and Joiners of America, Local 25, an unincorporated association (Local 25), the Los Angeles County District Council of Carpenters, an unincorporated association (Council), United Brotherhood of Carpenters and Joiners of America, AFL-CIO,<sup>1/</sup> an unincorporated association (United Brotherhood), Earl George Daley (Daley), Benjamin Fenwick (Fenwick), Joseph Wilk (Wilk), James Keene (Keene) and Kenneth Scott (Scott). The amended complaint contained four causes of action; the court sustained demurrers without leave to amend as to Counts I, III and IV and overruled the demurrer to Count II.<sup>2/</sup>

<sup>1/</sup>  
We substitute the name under which the defendant appeared.

<sup>2/</sup>  
Since Hill does not appeal from the judgment we will treat the legal problems as if only cause of action II had been filed.

After answer, the case was tried by a jury. The court dismissed the action as to Keene. Hill Voluntarily dismissed as to Scott and United Brotherhood. The jury returned a verdict in favor of Hill for \$7,500 actual damages and \$175,000 exemplary damages against Local 25, Council, and Daley and a verdict in favor of Fenwick and Wilk. Local 25, council and Daley appeal from the judgment.

### CONTENTIONS

Appellants contend:

I. The superior court did not have jurisdiction where the alleged tort of intentionally inflicting emotional distress arose out of and as the result of alleged acts of discrimination in the hiring and dispatching policies and conduct by Local 25 inasmuch as that subject matter is pre-empted by the National Labor Relations Act.<sup>3/</sup>

3/

For sake of brevity and simplicity we have reworded and compressed appellants' argument into one sentence. As originally stated by appellant, this one point contains eight subdivisions and aggregates one and a half pages of headings. In addition, appellants (apparently out of an abundance of caution) urge eight additional grounds for reversal aggregating two and one half additional pages of headings. These  
(con't p. A-4)

### FACTS

The amended complaint alleged: that Local 25 was an unincorporated association affiliated with Council and United Brotherhood "possessing and asserting jurisdiction over members of these organizations, that Local 25 is affiliated to the other organizations and is chartered by them and derives its power, duties and jurisdiction from each of them," that defendants "were and now are engaged in the business of being a labor union, or employees of a labor union," that each defendant was the "agent and employee of each of the remaining defendants and was at all times acting within the purpose and scope of such agency and employment," that Hill was a member in good standing of each of the organizations. The critical paragraph (13) of the second cause of action reads:

3/ (con't)

claims of alleged error relate to the conduct of the trial and they type of damages awarded. Since we conclude that the jurisdictional point is dispositive of this appeal and that reversal is mandated by federal law, we deem it inappropriate and unnecessary to attempt to match the scholarly effort of the parties and amicus curiae whose briefs aggregate almost 300 pages.



"During the aforesaid period Defendants, and each of them, made repeated oral threats to Plaintiff to the effect that as long as they controlled the job-dispatching procedures that Plaintiff would be and he was given inferior assignments and be by-passed for work assignments. During the same period, as aforesaid, Defendants, and each of them, repeatedly threatened Plaintiff with actual or defacto expulsion from the union in retaliation for his political activities, and further threatened to deprive [sic] Plaintiff of his ability to earn a living as a carpenter.

"Defendants, and each of them, knew or reasonably should have known or expected that their outrageous conduct, threats, intimidation, and words would result in severe emotional, mental and physical damage to Plaintiff. "

The second cause of action further alleged that as a proximate result "of the intentional and wrongful discriminatory conduct practiced by Defendants and each of them as aforesaid Plaintiff has suffered a nervous breakdown, grievous mental anguish and bodily injury making him sick, sore and lame"; (emphasis ours) to his general damage in the sum of \$500,000. The complaint also alleged "all of the aforesaid acts, conduct and discrimination by Defendants, and each of them was done deliberately and maliciously" (emphasis ours) for which Hill sought an additional \$500,000 as punitive damages.

At trial, Hill produced evidence from which the jury could conclude that Daley was business agent of Local 25, that Daley dispatched members of Local 25 to job sites on work assignments, that Hill was vice president of Local 25 during the period 1955-1968, that he had certain disputes and disagreements with Daley, that in January 1967, while he (Hill) was unemployed and on the out of work assignment list of Local 25, he was by-passed in assignment, that he complained to Daley and was told to go complain to Council, that he was a "jerk, knothed, idiot" and that he should go to another Local union, that he had other disputes with Daley concerning a credit union established by Local 25 and expenses incurred by Daley, that Daley dispatched other carpenters to work assignments ahead of him and he complained to Daley on the dispatching procedures, that Daley told him he would sit on the bench until "hell freezes over." Hill testified that other Union officials (Wilk and Fenwick) treated him the same way, that he told Daley he would file with the National Labor Relations Board (N.L.R.B.). Hill produced evidence that certain job site employers requested that he (Hill) be assigned to their jobs, but Local 25 assigned other Union members.

Hill testified that he filed charges with Council about Daley's dispatching procedures but that the Executive Board of Council dismissed the charges. Hill admitted that he was given some work assignments but he was also given other assignments where the work was non-existent. On other assignments the type of work was

unsatisfactory and he refused to accept it.

Hill testified that he ran for the office of President of Local 25 on the ground that Daley was a drunken fool, a disgrace to the Union and corrupt and that he was discriminating in running the hiring hall. Hill testified that in 1967 he filed a charge with the N.L.R.B. on the Dinwiddy-Simpson construction job (Crocker Citizens Bank Building), alleging discriminatory assignment and that in November 1968, the N.L.R.B. found that there had been discrimination and the notice of discrimination from the N.L.R.B. which the N.L.R.B. required be posted "in a conspicuous place for 60 days" was buried by Daley on the window of one of the inner offices where nobody would see it.

Hill testified that he and Daley never engaged in any fight or struck any blows but that on one occasion Daley invited him to "go out in the street and fight." The invitation was apparently not accepted. Hill called Daley as an adverse witness and examined him at great length as to his work assignment practices.

Hill also produced evidence that Daley prevented him from performing his official duties as vice president of the Union, that Daley would not let him preside in the absence of the President because Daley claimed that he (Hill) was inadequate, that Daley ridiculed him and insulted him before other Union members, that Daley urged him to leave the Union, that Daley threatened him, that Daley threatened to starve

him by refusing work assignments, that Daley fabricated a dispatch slip in order to place Hill's name at the bottom of the out-of-work list from which assignments were made, that Daley interfered with his unemployment insurance benefits by telling the state agency that Hill had refused work assignments, that Daley would assign him to jobs which he was not qualified for and "just can't handle" which was contrary to Union rules and regulations which allowed members to classify themselves regarding their work capabilities, that Daley refused to honor employers' specific request for Hill, that he was threatened and intimidated because he filed charge with the N.L.R.B., that an agent of Council told 250 union members ". . . a brother ran down to the [N.L.R.B.] and there's no brother going to extract money from this Union and stay in it," that Daley dispatched him to short jobs only -- the Ruane Job, 35 hours; the Burke Job, 0 hours; the Weymouth-Crowell Job, 2 days; the Spear Job, 2 days -- during which period there were 108 job opportunities on which other members were assigned, that Daley fabricated a dispatch of Hill to the Steel Form Company job which Hill allegedly refused, when in reality Hill received no such assignment. This was done in order to place Hill's name at the bottom of the job assignment list.

Hill claims that the totality of this evidence "constitutes an intentional infliction of severe emotional distress." Hill produced medical evidence regarding his alleged damages.



The defendants produced substantial evidence that employers did not request or want Hill on various jobs, that Hill had refused to work on various jobs, that Hill talked too much on the job, that he interfered with the work on various jobs, that Hill called Daley a drunken bum and then the two often drank and played poker together.

Wilk testified that he frequently drank with Hill and Daley, that he offered Hill various work assignments which Hill refused, that Hill called him a "dumb Polack" and would blow smoke in his face.

#### DISCUSSION

Despite the multiplicity of arguments for reversal presented by appellants, we conclude, as indicated, that one argument is basic and controlling -- that the federal government has pre-empted this field and the state courts have no jurisdiction, that jurisdiction to right the alleged wrong is vested in the N.L.R.B. We regard four cases as controlling -- San Diego Building Trades Council v. Garmon, 359 U.S. 236, 3 L. Ed. 2d 775, 79 S.Ct. 773; Local 100 v. Borden, 373 U.S. 690, 83 S.Ct. 1423, 10 L.Ed. 2d 638; Iron Workers Union v. Perko, 373 U.S. 701, 83 S.Ct. 1429, 10 L.Ed. 2d 646; and Motor Coach Employees v. Lockridge, 403 U.S. 274, 91 S.Ct. 1909, 29 L.Ed. 2d 473.

In San Diego Building Trades Council v. Garmon, supra, the Supreme Court reversed a

judgment of a state court awarding damages against a labor union allegedly sustained as the result of picketing by a labor union in the course of a labor dispute. In reversing judgment the Supreme Court said (at pp. 244-245):

"When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law. Nor has it mattered whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations. [Fn. omitted.] Regardless of the mode adopted, to allow the States to control which is the subject of national regulation would create potential frustration of national purpose.

"At times it has not been clear whether the particular activity regulated by the States was governed by § 7 or § 8 or was, perhaps, outside both these sections. But courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board. What is outside the scope of this Court's authority cannot remain within a State's power. State jurisdiction

too must yield to the exclusive primary competence of the Board. See, e.g., Garner v. Teamsters C. & H. Local Union, 346 US 485, especially at 489-491, 98 L ed 228, 238-240, 74 S Ct 161; Weber v. Anheuser-Busch, Inc. 348 US 468, 99 L ed 546, 75 S Ct 480.

"The case before us is such a case. The adjudication in California has throughout been based on the assumption that the behavior of the petitioning unions constituted an unfair labor practice. This conclusion was derived by the California courts from the facts as well as from their view of the Act. It is not for us to decide whether the National Labor Relations Board would have, or should have, decided these questions in the same manner. When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." Ibid.

"To require the States to yield to the primary jurisdiction of the National Board does not ensure Board adjudication of the status of a disputed activity. If the Board decides, subject to appropriate federal judicial review, that conduct is protected by § 7, or prohibited by § 8, then the matter is at an end, and the States are ousted of all jurisdiction. . . ."

In Garmon the N.L.R.B. had declined jurisdiction.

In Local 100 v. Borden, supra, Borden, a member of a Louisiana Local Plumbers' Union, attempted to secure a job with the Farwell Construction Company in Dallas, Texas. The business agent of the Dallas local refused to assign Borden to the job even though the foreman on the job had requested Borden. The business agent of the Dallas local refused to assign Borden apparently because Borden had procured the job himself and "he soved his [Union] card down our throat." Borden filed an action for damages in the Texas state courts, alleging that the actions of the defendants "constituted a wilful, malicious and discriminatory interference with his right to contract." (Emphasis ours.) Local 100 challenged the jurisdiction of the state courts, alleging that the N.L.R.B. had exclusive jurisdiction. The trial court upheld the claim but the Texas Court of Civil Appeals reversed and remanded for trial. The Texas Supreme Court affirmed the remand on another point. On trial the jury made an award of \$1916 for actual damages, \$1500 for "mental suffering and \$5000 for punitive damages." The trial court disallowed the award for mental suffering and remitted punitive damages in excess of \$1916 -- the amount of the actual damages as found by the jury. The Texas Court of Civil Appeals affirmed and the Supreme Court of Texas denied a writ of error. The United States Supreme Court granted certiorari and reversed. The United States Supreme Court said in part (at pp. 693-696):

"This Court held in San Diego Bldg. Trades Council v. Garmon, 359 US 236, 3 L ed



2d 775, 79 S.Ct 236, that in the absence of an overriding state interest such as that involved in the maintenance of domestic peace, state courts must defer to the exclusive competence of the National Labor Relations Board in cases in which the activity that is the subject matter of the litigation is arguably subject to the protections of § 7 or the prohibitions of § 8 of the National Labor Relations Act. [Fn. omitted.] This relinquishment of state jurisdiction, the Court stated, is essential 'if the danger of state interference with national policy is to be averted.' 359 US, at 245, and is as necessary in a suit for damages as in a suit seeking equitable relief. Thus the first inquiry, in any case in which a claim of federal preemption is raised, must be whether the conduct called into question may reasonably be asserted to be subject to Labor Board cognizance. [Emphasis ours.]

"In the present case, respondent contends that no such assertion can be made, but we disagree. [Fn. omitted.] The facts as alleged in the complaint, and as found by the jury, are that the Dallas union business agent, with the ultimate approval of the local union itself, refused to refer the respondent to a particular job for which he had been sought, and that this refusal resulted in an inability to obtain the employment. Notwithstanding the state court's contrary view, if it is assumed that the refusal and the resulting inability to obtain employment were in some way based on respondent's actual or believed failure to comply with internal rules, it is certainly "arguable" that the union's conduct violated

§ 8 (b) (1) (A), by restraining or coercing Borden in the exercise of his protected right to refrain from observing those rules, and § 8 (b) (2), by causing an employer to discriminate against Borden in violation of § 8 (a) (3). . . .

"It may also be reasonably contended that after inquiry into the facts, the Board might have found that the union conduct in question was not an unfair labor practice but rather was protected concerted activity within the meaning of § 7. This Court has held that hiring-hall practices do not necessarily violate the provisions of federal law, International Brotherhood of T. C. W. & H. v. NLRB, 365 US 667, 6 L ed 2d 11, 81 S Ct 835, and the Board's appraisal of the conflicting testimony might have led it to conclude that the refusal to refer was due only to the respondent's efforts to circumvent a lawful hiring-hall arrangement rather than to his engaging in protected activities. The problems inherent in the operation of union hiring halls are difficult and complex, see Rothman, The development and Current Status of the Law Pertaining to Hiring Hall Arrangements, 48 Va L Rev 871, and point up the importance of limiting initial competence to adjudicate such matters to a single expert federal agency."

"We need not and should not now consider whether the petitioner's activity in this case was federally protected or prohibited, on any of the theories suggested above or on some different basis. [Fn. omitted.] It is sufficient for present purposes to find, as we do, that it is reasonably 'arguable' that the matter comes within the



Board's jurisdiction." (Emphasis ours.)

The court then distinguished Machinists v. Gonzales, 356 U.S. 617, 78 S.Ct. 923, 2 L. Ed. 2d 1018, which involved a state action for restoration to union membership where there had been an allegedly unlawful expulsion. The court then said (at pp. 697-698):

"The suit involved here was focused principally, if not entirely, on the union's actions with respect to Borden's efforts to obtain employment. No specific equitable relief was sought directed to Borden's status in the union, and thus there was no state remedy to 'fill out' by permitting the award of consequential damages. The 'crux' of the action (Gonzales, 356 US, at 618) concerned Borden's employment relations and involved conduct arguably subject to the Board's jurisdiction.

"Nor do we regard it as significant that Borden's complaint against the union sounded in contract as well as in tort. It is not the label affixed to the cause of action under state law that controls the determination of the relationship between state and federal jurisdiction. Rather, as stated in Garmon, supra (359 US at 246), '[o]ur concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered.' (Emphasis added.)

"In the present case the conduct on which the suit is centered, whether described in terms

of tort or contract, is conduct whose lawfulness could initially be judged only by the federal agency vested with exclusive primary jurisdiction to apply federal standards." (Emphasis ours.)

In Ironworkers Union v. Perko (decided on the same date), supra, Perko (a union member) sued the Union and certain of its officials at common law in Ohio State Courts, seeking damages because the defendants had allegedly entered into a conspiracy to deprive Perko of his right to work as a foreman. Perko alleged that defendants had induced employees to discharge Perko and that defendants had prevented him from obtaining work. The trial court dismissed and the Ohio Supreme Court reversed. The United States Supreme Court said that the Ohio Supreme Court said:

"Plaintiff is not attempting to secure any redress for loss of rights as a member of the union. . . . He is alleging that the union to which he belonged and certain named officials thereof committed a common-law tort against him by conspiring to deprive him of his right to earn a living and interfering with his contract of employment. . . ." (Emphasis ours.)

The Supreme Court of the United States also characterized the decision of the Ohio Supreme Court as follows (at p. 703):

"In answer to the union's argument that federal law precluded the exercise of state jurisdiction, the court stated that there was no federal preemption with regard to a state action 'to

recover damages for a common-law tort, which is also an unfair labor practice,' citing International Asso. of Machinists v. Gonzales, 356 US 617, 2 L ed 2d 1018, 78 S Ct 923."

The case was tried. The trial court instructed the jury to return a verdict for the defendants which was reversed on appeal by the Ohio courts and the case was finally retried by a jury resulting in a verdict for \$25,000 for Perko which was affirmed by the Ohio Court of Appeals. The U.S. Supreme Court granted certiorari to consider the defendant's claim that the state courts lacked jurisdiction by virtue of the National Labor Relations Act. The U.S. Supreme Court said:

"As in Borden, the crux of the action here concerned alleged interference with the plaintiff's existing or prospective employment relations and was not directed to internal union matters. Indeed the state court itself observed that 'Plaintiff is not attempting to secure any redress for loss of rights as a member of the union.' supra, p. 648. Thus there was no permissible state remedy to which the award of consequential damages for loss of earnings might be subordinated."

The U.S. Supreme Court then considered the question whether or not the fact that Perko was a "foreman" compelled a result different from Borden. Among other elements the court concluded that Perko might still be considered by the N.L.R.B. as an employee (not as a

supervisor) and even if he was a supervisor the union could be guilty of an unfair labor practice against a supervisor. The Supreme Court concluded:

"We do not of course intimate any view on the merits of any of the underlying substantive questions, that is, whether the union was guilty of a violation of the Act. It is enough to hold, as we do, that it is plain on a number of scores that the subject matter of this lawsuit 'arguably' comes within the Board's jurisdiction to deal with unfair labor practices. We therefore conclude that the State must yield jurisdiction and the judgment below must be

Reversed."

We conclude from the foregoing that if the union conduct complained of "'arguably' comes within the Board's [N.L.R.B.] jurisdiction to deal with unfair labor practices" then state jurisdiction is preempted and the N.L.R.B. has exclusive jurisdiction.

An additional and later case which supports this conclusion is Motor Coach Employees v. Lockridge, supra, wherein Lockridge recovered damages in a state court (Idaho) action for allegedly nonpayment of union dues. Lockridge alleged that the defendants "acted wantonly, wilfully and wrongfully and without just cause . . . and plaintiff has been harassed and subject to mental anguish." (Emphasis ours.) The U.S. Supreme Court granted certiorari. It characterized the Garmon case as follows:



"San Diego Building Trades Council v. Garmon, 359 US 236, 3 L Ed 2d 775, 79 S Ct 773 (1959), established the general principle that the National Labor Relations Act pre-empts state and federal court jurisdiction to remedy conduct that is arguably protected or prohibited by the Act. That decision represents the watershed in this Court's continuing effort to mark the extent to which the maintenance of a general federal law of labor relations combined with a centralized administrative agency to implement its provisions necessarily supplants the operation of the more traditional legal processes in this field. We granted certiorari in this case, 397 US 1006, 25 L Ed 2d 419, 90 S Ct 1232 (1970), because the divided decision of the Idaho Supreme Court demonstrated the need for this Court to provide a fuller explication of the premises upon which Garmon rests and to consider the extent to which that decision must be taken to have modified or superseded this Court's earlier efforts to treat with the knotty pre-emption problem." (Emphasis ours.) (At p. 276.)

The Supreme Court referred to section 8 of the National Labor Relations Act and various subdivisions thereof which make it an unfair labor practice to encourage or discourage union membership. The court said:

"Further, in San Diego Building Trades Council v. Garmon, 359 US, at 245, 3 L Ed 2d, at 783, we held that the National Labor Relations Act pre-empts the jurisdiction of state and federal courts to regulate conduct 'arguably

subject to § 7 or § 8 of the Act.' On their face, the above-quoted provisions of the Act at least arguably either permit or forbid the union conduct dealt with by the judgment below. For the evident thrust of this aspect of the federal statutory scheme is to permit the enforcement of union security clauses, by dismissal from employment, only for failure to pay dues. Whatever other sanctions may be employed to exact compliance with those internal union rules unrelated to dues payment, the Act seems generally to exclude dismissal from employment." (At p. 284.)

The Supreme Court alluded to the fact that the Idaho Supreme Court in affirming the Idaho judgment for damages attempted to base the decision on Idaho contract law. The court concluded that that was not a sufficient basis to nullify the preemption doctrine. The court reviewed its efforts to find a basis for sustaining state action, one of which was "on whether the States purported to apply a remedy not provided for by the federal scheme, e.g. Weber v. Anheuser-Busch, Inc., 348 U.S. 468, 479-480, . . . ." The court then concluded:

"The failure of alternative analyses and the interplay of the foregoing policy considerations, then, led this Court to hold in Garmon, 359 US, at 244, (3 L Ed 2d at 782):

"When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National



Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law.'" (At p. 291.)

It is true that in the case at bar that Hill complained of incidental conduct which might not directly involve his employment, such as the fact that Daley used abusive language, called Hill foul names and that Daley invited him outside on one occasion for a fight. Also that Daley advised the state unemployment insurance people that Hill had refused work assignments and was therefore not eligible for unemployment benefits. It is undoubtedly true that there was bitter animosity between the two men which was reflected in a variety of ways. However, we think the words of the United State Supreme Court in Borden, supra, are controlling. To paraphrase: "The 'crux' of the action (Gonzales, 356 U.S. at 618) concerned [Hill's] employment relations and involved conduct arguably subject to the Board's jurisdiction."

"... our concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhindered." (Emphasis added.)<sup>4/</sup> [P] In the present

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<sup>4/</sup> Emphasis added by U.S. Supreme Court.

case the conduct<sup>5/</sup> on which the suit is centered, whether described in terms of tort or contract, is conduct whose lawfulness could initially be judged only by the federal agency vested with exclusive primary jurisdiction to apply federal standards." In the case at bar the "crux" of the action concerned Hill's employment. The "crux" of the action was arguably subject to Board's jurisdiction. The conduct on which the suit is "centered" is conduct which is within the Board's exclusive primary jurisdiction to apply federal standards.

In the case at bar the trial court committed the same error which was committed by the Supreme Court of Ohio in Perko. The trial court here and the Supreme Court of Ohio there concluded that the federal preemption doctrine did not apply to a state action "to recover damages for a common law tort, which is also an unfair labor practice.'" The common law tort to which the Ohio Supreme Court referred was that "certain named officials thereof [of the local union] committed a common-law tort against him [Perko] by conspiring to deprive him of his right to earn a living and interfering with his contract of employment.'" The United States Supreme Court held that the Ohio Supreme Court was in error because "the crux of the action here concerned alleged interference with the plaintiff's existing or prospective employment relations." (Emphasis ours.)

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<sup>5/</sup> Emphasis added by U.S. Supreme Court.

The fact that in the case at bar Hill sought damages for mental anguish should not change the result here any more than such a claim for mental anguish changed the result in Borden, supra and Lockridge, supra. It is the "crux" of the causes of action, the "conduct" which is complained of which controls whether federal or state courts have jurisdiction, not the type of damage which is caused by such conduct.

In the case at bar we are not required to speculate whether or not the wrongs which Hill complains of were "arguably" within the jurisdiction of the N.L.R.B. Here the N.L.R.B. did in fact assume jurisdiction, it did find that Local 25 was guilty of unfair labor practices in making work assignments of Hill in the Dinwiddy-Simpson job for the construction of the "Crocker Citizens Bank" building and awarded Hill \$2,517 back wages for discriminating conduct with reference to that job. Hill filed other charges of unfair labor practices with the N.L.R.B. but voluntarily withdrew them.

We presume that the N.L.R.B. would have correctly decided the additional matters and would have granted the relief, if any, to which Hill was legally entitled if Hill had pursued the matter further before the N.L.R.B. But Hill was apparently dissatisfied with the award of \$2,517 from the N.L.R.B. and sought the more generous bounties of a common law jury. Such an approach might have been permissible under Weber v. Anheuser-Busch, Inc., supra, but that concept was repudiated by Local No. 207 v.

Perko, supra, wherein the U.S. Supreme Court said if the union conduct is "arguably" within the jurisdiction of the N.L.R.B., state jurisdiction is preempted even though state jurisdiction may award greater relief than would be awarded by the N.L.R.B.

Here there is no doubt in our view that the "crux" of the conduct of the defendants complained of by Hill related directly or indirectly to his employment and work assignments. The key allegation of his complaint was that the defendants "made repeated oral threats to the effect that as long as they controlled job dispatching procedures that [Hill] would be and he was given inferior assignments and be bypassed for work assignments." (Emphasis ours.) That he was threatened with actual and de facto expulsion in "retaliation for his political activities" and defendants "further threatened to deprive [Hill] of his ability to earn a living as a carpenter." That "as a proximate result of the intentional and wrongful discriminatory conduct" (emphasis ours) Hill suffered certain damages.

We are unable to distinguish the case at bar from Association of Journeyman v. Borden, supra, Inroworkers' Union v. Perko, supra, and Motorcoach Employees v. Lockridge, supra.

Hill contends that this is an action at common law for damages for intentional infliction of emotional distress. But in Borden, supra, the U.S. Supreme Court said that it is not significant that the complaint "sounded in contract



as well as in tort." The court also said: "It is not the label affixed to the cause of action under state law that controls the determination of the relationship between state and federal jurisdiction. Rather as stated in Garmon, supra (359 U.S. at 246) '[o]ur concern is with the delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered.' (Emphasis added.)" (At p. 698.)

In both Borden and Lockridge the plaintiff sought damages for emotional and mental distress. As we have already stated, in each instance the U.S. Supreme Court in effect held that that was not determinative, that the determinative factor was the "areas of conduct" not the type of damage that is inflicted as a proximate result of the conduct. The very purpose of having one uniform national policy administered by a single specially constituted tribunal would be completely frustrated and defeated if it were legally permissible for juries in the fifty different state tribunals to award different amounts of damage for conduct which is essentially within the jurisdiction of the N.L.R.B. A labor union could be completely wiped out financially by such awards resulting in substantial detriment to other innocent union members whose livelihood depends upon continued union representation. A collusive action with such a result is not beyond the realm of possibility. If the award of damages by the N.L.R.B. is inadequate for any reason, the remedy lies with the federal government, not by resort to the tribunals of the fifty different states. Hill seeks to distinguish Borden, supra, and

Perko, supra, on the ground that each case involved a single act of unfair labor practice rather than a course of conduct which is what is involved in the case at bar. We regard this as a difference without legally significant distinction. We are cited to no authority that holds that N.L.R.B. jurisdiction is limited to single acts of unfair labor practice and that it has no jurisdiction of a course of conduct.

For purposes of illustration only we note that under section 187 of the Labor Management Act (29 U.S.C.A.) Congress did expressly reserve to the injured party causes of action for damages in U.S. District Courts "or in any other court having jurisdiction of the parties" resulting from an unfair labor practice under section 158 (b) (4) (secondary boycotts). If the Congress had intended to allow the fifty different states power to award damages for the type of action arising out of the unfair labor practices alleged in the case at bar, it would have been an extremely simple matter to enlarge the provision of section 187 to encompass such actions.

What we have said is not in conflict with Alcon v. Ambro Engineering, Inc., 2 Cal.3d 493, which is relied on by Hill. There Alcon was expelled from a union solely on racial grounds. The court held that he had a cause of action for damages for intentionally inflicting emotional distress. The California Supreme Court did not discuss the preemption doctrine. No one raised that point presumably because the case related to union membership rather than unfair



labor practices in the course of actual employment. In International Association of Machinists v. Gonzales, the U.S. Supreme Court recognized that the expulsion of a member from a union related to purely internal union matters and did not relate to employment or discriminatory practices which constituted unfair labor practices within the arguable jurisdiction of the N.L.R.B. An action for damages for expulsion from a union was then recognized as an exception to the preemption doctrine and such an action could be maintained in a state tribunal. Alcon v. Ambro Engineering Inc. comes within this exception. That case, unlike this case, may well involve constitutional questions. The case at bar, unlike Shaw v. MGM, Inc., 37 Cal.App.3d 587; Mogallanes v. Local 300, 40 Cal.App.3d 809 and Breitegger v. Columbia Broadcasting System, 43 Cal.App.3d 283, is not an action under section 301 of the National Labor Relations Act (29 U.S.C.A.) to recover damages or otherwise enforce a collective bargaining agreement. Such an action is expressly permitted by federal law and the state and federal courts are given concurrent jurisdiction of such an action by federal law. Although the complaint in the case at bar makes casual reference to threatened union expulsion, it is clear that no expulsion in fact occurred and that the primary thrust of the complaint and the evidence (the "crux" of the case) arguably constituted unfair labor practices. The case at bar, therefore, is within the general rule and the cause of action here is preempted by federal policy.

We conclude that the trial court herein was without jurisdiction and that jurisdiction was vested in the N.L.R.B.

The judgment is reversed with instructions to render judgment for the defendants and dismiss the action.

CERTIFIED FOR PUBLICATION.

LORING, J.\*

We concur:

STEPHENS, Acting P.J.  
HASTINGS, J.

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\*Assigned by Chairman of the Judicial Council.

APPENDIX B

CLERK'S OFFICE, SUPREME COURT  
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

SEP 10 1975

I have this day filed Order \_\_\_\_\_

~~HEARING DENIED~~

In re: 2 Civ. No. 43751  
Hill

vs.

United Brotherhood of  
Carpenters Respectfully,

G. E. BISHEL  
Clerk

91248-877 2-75 SM OSP

APPENDIX C

Section 7 of the Labor Management Relations Act of 1947 (29 U.S.C. §157) provides as follows:

"Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."

Section 8 of the Labor Management Relations Act of 1947 provides in pertinent part as follows:

"(a) It shall be an unfair labor practice for an employer --

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and

regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such

membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; . . .

"(b) It shall be an unfair labor practice for a labor organization or its agents --

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in Section 157 of this title: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; . . ."



# APPENDIX

Supreme Court, U. S.

Vol. I, No. 12

JUL 9 1976

## IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75 - 804

JOY A. FARMER, Special  
Administrator of the Estate  
of Richard T. Hill,

Plaintiff-Petitioner,

vs.

UNITED BROTHERHOOD OF  
CARPENTERS AND JOINERS  
OF AMERICA, LOCAL 25,  
et al.,

Defendants-Respondents.

---

ON WRIT OF CERTIORARI TO THE  
CALIFORNIA COURT OF APPEAL  
SECOND APPELLATE DISTRICT,  
DIVISION FIVE

---

PETITION FOR CERTIORARI  
Filed December 5, 1975

CERTIORARI GRANTED  
January 26, 1976

## APPENDIX

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PETITION FOR CERTIORARI  
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Direct Examination 585

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behalf of Defendants

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Chronological List  
of  
Relevant Docket Entries

1. April 17, 1969 -- Plaintiff Hill's original Complaint for Damages (Personal Injury) filed in Superior Court of the State of California for the County of Los Angeles.
2. January 31, 1972 -- Plaintiff's Motion to File First Amended Complaint for Damages filed.
3. March 7, 1972 -- Plaintiff's Motion to File First Amended Complaint granted.
4. April 4, 1972 -- Defendants' Demurrer to First Amended Complaint for Damages filed.
5. May 12, 1972 -- Demurrer sustained as to First, Third and Fourth Causes of Action of First Amended Complaint without leave to amend, but overruled as to Second Cause of Action.
6. June 20, 1972 -- Defendants' Answer to First Amended Complaint filed.
7. December 11, 1972 -- Jury trial of action commenced.
8. February 2, 1973 -- Court's charge to jury.
9. February 2, 1973 -- Verdict of jury in favor of Plaintiff.

a.

10. February 5, 1973 -- Judgment of Superior Court entered, awarding Plaintiff \$7500 in compensatory damages and \$175,000 in punitive damages against Defendants Daley, Local 25 of the United Brotherhood of Carpenters and Joiners of America and the Los Angeles District Council of Carpenters.
11. March 30, 1973 -- Defendants' Notice of Appeal filed.
12. June 30, 1975 -- Opinion of Court of Appeal of the State of California, Second Appellate District, Division Five, filed.
13. September 10, 1975 -- Petition for Hearing in California Supreme Court denied.

b.

[CT 102]

SUPERIOR COURT  
OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES

RICHARD T. HILL,	)
	)
Plaintiff,	)
	)
vs.	)
	)
UNITED BROTHERHOOD OF	) No. 951 866
CARPENTERS AND JOINERS	)
OF AMERICA, LOCAL 25,	) PROPOSED
an unincorporated association;	) FIRST
THE LOS ANGELES COUNTY	) AMENDED
DISTRICT COUNCIL OF	) COMPLAINT
CARPENTERS, an unincorporated	) FOR
association; UNITED BROTHER-	) DAMAGES
HOOD OF CARPENTERS AND	)
JOINERS OF AMERICA, an	) Filed
unincorporated association;	) January 31,
EARL GEORGE DALEY;	) 1972
BENJAMIN FENWICK; JOSEPH	)
WILK; JAMES KEEN; KENNETH	)
SCOTT; GREEN COMPANY, a	)
corporation; BLACK COMPANY,	)
an unincorporated association;	)
DOES I through XX, inclusive,	)
	)
Defendants.	)

1.

FOR CAUSE OF ACTION against all  
Defendants, Plaintiff alleges:

1.

The true names and capacities, whether  
individual, corporate, associate, or otherwise,  
of defendants GREEN COMPANY, BLACK

[CT 103]\*

COMPANY,\* and DOES I through XX, inclusive,  
are unknown to Plaintiff who therefore sues said  
Defendants by such fictitious names; Plaintiff  
is informed and believes and thereon alleges  
that each of the Defendants so fictitiously  
designated herein is legally responsible in some  
manner for the events and happenings herein  
referred to, and caused injury and damages to  
the Plaintiff as herein alleged.

2.

At all times relevant herein Defendant  
UNITED BROTHERHOOD OF CARPENTERS  
AND JOINERS OF AMERICA, LOCAL 25 was,  
and still is, an unincorporated association  
affiliated with Defendant LOS ANGELES COUNTY  
DISTRICT COUNCIL OF CARPENTERS and  
with Defendant UNITED BROTHERHOOD OF  
CARPENTERS AND JOINERS OF AMERICA,  
and possessing and asserting jurisdiction over  
members of these organizations at said Local's  
main office located in the City and County of Los  
Los Angeles, California. Local 25 is affiliated

2.



to the other Defendant organizations and is chartered by them and derives its power, duties and jurisdiction from each of them.

3.

At all times herein mentioned Defendants, and each of them, were and now are engaged in the business of being a labor union, or employees of a labor union, operating under the common and fictitious names as aforesaid, and said Defendants are sued herein by said common names pursuant to the provisions of Section 388 of the California Code of Civil Procedure.

4.

At all times herein mentioned each of the Defendants was the agent and employee of each of the remaining Defendants and was at all times acting within the purpose and scope of said agency

[CT 104]\*

and\* employment.

5.

At all times relevant herein Plaintiff was, and still is, a journeyman carpenter and a member in good standing with each and every organization listed in paragraph 2 above. Plaintiff has duly sought and exhausted all of his remedies provided for in the constitutions and/or by-laws of the aforesaid organizations.

3.

6.

At all times mentioned herein there has been in existence that certain collective bargaining agreement entitled "Master Labor Agreement Between Southern California General Contractors and United Brotherhood of Carpenters and Joiners of America" (hereinafter referred to as the "Agreement") between Defendant labor organizations and the Southern California Chapter of the Associated General Contractors of America, The Engineering and Grading Contractors Association, Inc., the Building Industry Association of California.

Article II, Section 201 of said Agreement provides: "The Contractors hereby recognize the Union as the sole and exclusive collective bargaining representative of employees of the Contractors over whom the Union has jurisdiction."

Section 203 provides: "This Agreement shall be binding upon each and every eligible member of the Southern California Chapter of The Associated General Contractors of America, and The Engineering and Grading Contractors Association, Inc., with the same force and effect as if this Agreement were entered into by each member individually; and this Agreement shall be binding upon each and every member of the

[CT 105]\*

Building Industry Association of\* California, Inc., who becomes signatory hereto."

4.

Section 204 provides: "In the employment of workmen for all work covered by this Agreement . . . the following provisions . . . shall govern: 204.1 The Local Unions shall establish and maintain open and non-discriminatory employment lists for the use of workmen desiring employment on work covered by this Agreement and such workmen shall be entitled to use such lists free of charge."

Section 204.2 provides: "The Contractors shall first call upon the Local Union having work and area jurisdiction for such men as they may from time to time need, and the respective Local Union shall furnish to the Contractors the required number of qualified and competent workmen and skilled mechanics of the classifications needed by the Contractors strictly in accordance with the provisions of this Article.:

Section 204.4 provides: "The Local Union or District Council will dispatch in accordance with the request of the Contractor each such qualified and competent workman from among those entered on said lists in numerical order to the contractor by use of a written referral in the following order of preference and the selection of workmen for referral to jobs shall be on a non-discriminatory basis:

"204.4.1 Workmen specifically requested by name who have been employed, laid off or terminated as Carpenters in the geographic area of the Local Union or District Council, as the case may be, within three years before such

request by a requesting individual employer now desiring to reemploy the same workmen, provided they are available for employment.

[CT 106]

"204.4.2 Workmen who, within five years immediately before the Contractor's order for men have performed work of the type covered by this Agreement in the geographic area of the Agreement, as defined in paragraph 101, provided such workmen are available for employment.

"204.4.3 It is agreed that in connection with the preference outlined in subparagraph 204.4.2 up to 25% of the employees, excluding foremen, employed to perform work covered by this Agreement on any project may be employees designated by the individual employer."

7.

Pursuant to said Agreement carpenters who are seeking employment sign "availability lists." Thereafter, the business agents of Local 25 and/or the District Council are required, pursuant to said Agreement, to dispatch the unemployed carpenters from the availability lists on a "first sign, first dispatched" basis; as the chronologically earlier signers are dispatched to a job, the names remaining are moved "up" the list.

8.

Between January 1, 1967, and April 1, 1969, Plaintiff repeatedly signed the aforementioned lists of availability and was at all times ready, willing and able to accept available employment. During the same period Plaintiff's names was specifically requested by one or more employees. However, rather than dispatching Plaintiff to work as required Defendants, and each of them, wrongfully and intentionally refused to dispatch Plaintiff in accordance with The Rules of Procedure, always to the Plaintiff's economic and physical detriment.

[CT 107]

Plaintiff was further discriminated against in that Defendant and each of them, conspired to and did dispatch Plaintiff to jobs (when he was dispatched) of short duration and least desirability, rather than dispatching him to jobs in a systematic non-discriminatory order; by reason of said discrimination, Plaintiff was caused to be out of work and on the eligibility lists for longer time periods than normally would have been experienced but for said discrimination.

9.

There is and was no just reason for said discrimination against Plaintiff who is informed and believes, and on the basis of such information

7.

and belief alleges that the reason for said job discrimination was because Plaintiff was a leading member of an intra-union political faction generally regarded as being opposed to the political faction which was managing, operating and controlling Local 25 as well as the other Defendant labor organizations.

10.

As a proximate result of the intentional and wrongful discriminatory conduct practiced by Defendants, and each of them, as aforesaid, Plaintiff has suffered a nervous breakdown, grievous mental anguish and bodily injury making him sick, sore and lame; as a result Plaintiff has been hospitalized and forced to incur medical and related expenses, the exact amount of which is presently unknown to Plaintiff; Plaintiff will ask leave of the Court to insert said amount at the time of trial.

As a proximate result of the aforesaid intentional conduct of Defendants, and each of them, Plaintiff has suffered, and claims, general damages in the sum of \$500,000.00.

[CT 108]

11.

All of the aforesaid acts, conduct and discrimination by Defendants, and each of them,

8.



were committed deliberately and maliciously and by reason of such deliberate malice Plaintiff asks that punitive damages be assessed against Defendants, and each of them, in the sum of \$500,000.00.

SECOND SEPARATE CAUSE  
OF ACTION

For a second and separate cause of action against Defendants, and each of them, Plaintiff alleges:

12.

Plaintiff repeats and herein incorporates by reference as though fully set forth in detail Paragraphs 1, 2, 3, 4, 5, 10, and 11.

13.

During the aforesaid period Defendants, and each of them, made repeated oral threats to Plaintiff to the effect that as long as they controlled the job-dispatching procedures that Plaintiff would be and he was given inferior assignments and be by-passed for work assignments. During the same period, as aforesaid, Defendants, and each of them, repeatedly threatened Plaintiff with actual or defacto expulsion from the union in retaliation for his political activities, and further threatened to deprive Plaintiff of his ability to earn a living as a carpenter.

9.

Defendants, and each of them, knew or reasonably should have known or expected that their outrageous conduct, threats, intimidation, and words would result in severe emotional, mental and physical damage to Plaintiff.

[CT 109]

14.

Defendants, and each of them, intentionally caused, or recklessly disregarded the probability that said conduct would cause Plaintiff to suffer grievous mental and emotional distress as well as great physical damage to Plaintiff making him sick, sore and lame and causing Plaintiff a nervous breakdown requiring Plaintiff to be hospitalized.

15.

As a proximate result of the intentional and wrongful discriminatory conduct practiced by Defendants, and each of them, as aforesaid, Plaintiff has suffered a nervous breakdown, grievous mental anguish and bodily injury making him sick, sore and lame; as a result Plaintiff has been hospitalized and forced to incur medical and related expenses, the exact amount of which is presently unknown to Plaintiff; Plaintiff will ask leave of the Court to insert said amount at the time of trial.

10.

As a proximate result of the aforesaid intentional conduct of Defendants, and each of them, Plaintiff has suffered, and claims, general damages in the sum of \$500,000.00.

16.

All of the aforesaid acts, conduct and discrimination by Defendants, and each of them, were done deliberately and maliciously and by reason of such deliberate malice Plaintiff asks that punitive damages be assessed against Defendants, and each of them, in the sum of \$500,000.00.

### THIRD SEPARATE CAUSE OF ACTION

For a third and separate cause of action against Defendants, and each of them, Plaintiff alleges:

[CT 110]

17.

Plaintiff repeats and herein incorporates by reference as though fully set forth, Paragraphs 1, 2, 3, 4, 5, and 6 herein.

18.

That at the time said written Agreement was contracted by and between the aforesaid General

11.

Contractors and the aforesaid Defendant Labor Organizations, Plaintiff was a dues-paying member of all of the aforesaid Labor Organizations; and as such a member was a third party beneficiary of said Agreement in that said Agreement was negotiated for the benefit of Plaintiff.

19.

Plaintiff performed each and every act and thing required to be performed by him in accordance with the terms and conditions of said Agreement.

20.

On or about January 1, 1967, and on numerous occasions between January 1, 1967, and April 1, 1969, Defendants, and each of them, breached said contract by failing to dispatch Plaintiff to various jobs of employment in the manner and procedure required by said Agreement; Defendants, and each of them, further breached said Agreement by failing to dispatch Plaintiff to jobs of employment on a "non-discriminatory basis".

21.

As a proximate result of said breaches of contract, which has prevented Plaintiff from pursuing a livelihood, Plaintiff has suffered grievous mental suffering, anguish and bodily injury, making him sick, sore and lame; as a

12.

result Plaintiff has been forced to incur medical

[CT 111]\*

and related expenses, the exact amount\* of which is presently unknown to Plaintiff; Plaintiff will ask leave of the Court to insert said amount at the time of trial.

As a proximate result of the aforesaid conduct of Defendants, and each of them, Plaintiff has suffered and claims general damages in the sum of \$500,000.00.

FOR A FOURTH SEPARATE  
CAUSE OF ACTION

For a fourth and separate cause of action against Defendants, and each of them, Plaintiff alleges:

22.

Plaintiff repeats and herein incorporates by reference as though fully set forth, Paragraphs 1, 2, 3, 4, 5, and 6.

23.

On or before January 1, 1967, Plaintiff and Defendants, and each of them, entered into a written contract whereby Plaintiff agreed to join said Labor Organizations and to pay monetary dues to said Defendant organizations; pursuant to said written contract Plaintiff agreed to abide by

13.

and did abide by all rules and regulations of said organizations and to follow all rules, directives and procedures concerned with the dispatching of Union members to jobs of employment.

24.

A portion of the aforesaid written contract is entitled "Carpenter's Hiring Hall Procedures"; said document sets forth the same general dispatching procedures as those stated in Paragraph 6 herein; at the time the aforesaid written contract was agreed to by the parties, Defendants, and each of them, in writing and orally, agreed to dispatch Plaintiff solely and exclusively in accordance with the aforesaid Rules of Procedures.

[CT 112]

25.

Plaintiff has performed each and every act and thing required to be performed in accordance with the terms and conditions of said written contract.

26.

On or about January 1, 1967, and on numerous occasions between said date and April 1, 1969, Defendants, and each of them, breached said contract by failing and refusing to make dispatches pursuant to the Rules of Procedure as aforesaid, causing Plaintiff to lose work and to be unable to pursue his livelihood.

14.



27.

As a proximate result of said breaches of contract, which has prevented Plaintiff from pursuing a livelihood, Plaintiff has suffered grievous mental suffering, anguish and bodily injury, making him sick, sore and lame; as a result Plaintiff has been forced to incur medical and related expenses, the exact amount of which is presently unknown to Plaintiff; Plaintiff will ask leave of the Court to insert said amount at the time of trial.

As a proximate result of the aforesaid conduct of Defendants, and each of them, Plaintiff has suffered and claims general damages in the sum of \$500,000.00.

WHEREFORE, Plaintiff prays judgment as follows:

1. \$500,000.00 general damages on the First, Second, Third and Fourth Causes of Action;

2. Medical and related expenses according to proof on all Causes of Action;

3. \$500,000.00 punitive damages on the First and Second Causes of Action;

[CT 113]

4. For costs of suit incurred herein; and

15.

5. For such further relief as the Court may deems just.

COLEMAN, SILVERSTEIN  
& HOBART

By: \_\_\_\_\_  
G. DANA HOBART

[Proof of Service Omitted in Printing]

[CT 127]

DEFENDANTS' DEMURRER

Filed April 4, 1972

[Caption Omitted in Printing]

COME NOW, defendants UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 25; THE LOS ANGELES COUNTY DISTRICT COUNCIL OF CARPENTERS; UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; EARL GEORGE DALEY; BENJAMIN FENWICK; JOSEPH WILK; JAMES KEEN, AND KENNETH SCOTT, and demur to plaintiff's First Amended Complaint upon the following grounds:

16.

1. The cause of action set forth in the Complaint does not state facts sufficient to constitute a cause of action.

2. The Court has no jurisdiction of the subject matter of the First Cause of Action in that the matter is exclusively within the jurisdiction of the National Labor Relations Board and the federal courts.

3. The Second Cause of Action set forth in the Complaint does not state facts sufficient to constitute a cause of action

[CT 128]

4. The Court has no jurisdiction of the subject matter of the Second Cause of Action in that the matter is exclusively within the jurisdiction of the National Labor Relations Board and the federal courts.

5. The Third Cause of Action set forth in the Complaint does not state facts sufficient to constitute a cause of action.

6. The Court has no jurisdiction of the subject matter of the Third Cause of Action in that the matter is exclusively within the jurisdiction of the National Labor Relations Board and the federal courts.

7. The Fourth Cause of Action set forth in the Complaint does not state facts sufficient to

constitute a cause of action.

8. The Court has no jurisdiction of the subject matter of the Fourth Cause of Action in that the matter is exclusively within the jurisdiction of the National Labor Relations Board and the federal courts.

DATED: April 3, 1972.

GEFFNER & SATZMAN

BY: BRADLEY TABACH-  
BANK

Attorneys for Defendants

I hereby certify that this Demurrer is not filed for purposes of delay but that it is filed in good faith and in my opinion the grounds are well taken.

DATED: April 3, 1972.

BRADLEY TABACH-BANK

Attorney for Defendants

[Proof of Service Omitted in Printing]

[CT 190]

ORDER OF SUPERIOR COURT OF  
LOS ANGELES COUNTY

Rendered May 12, 1972

[Caption Omitted in Printing]

In this matter, heretofore  
deemed submitted May 5,  
1972 the Court now makes  
the following order:

Demurrer of defendants

United Brotherhood of  
Carpenters and Joiners  
of America, Local 25,  
The Los Angeles County  
District Council of  
Carpenters, United

Demurrer to the 1st,  
3rd and 4th causes of  
action sustained without  
leave to amend, pur-  
suant to points and  
authorities filed.

Brotherhood of Carpenters

and Joiners of America, Demurrer to the 2nd

AFL-CIO, Earl George Cause of action

Daley, Benjamin Fenwick, overruled.

Joseph Wilk, James Keen

and Kenneth Scott, to

First Amended Complaint

(Submitted)

Alcorn v. Anbro  
Engineering, 2  
C3d 493.

Counsel to give notice.

Copy of this order  
mailed to counsel.

[Proof of Service Omitted in Printing]

[CT 205]

ANSWER TO COMPLAINT

Filed June 20, 1972

[Caption Omitted in Printing]

COME NOW Defendants, UNITED  
BROTHERHOOD OF CARPENTERS & JOINERS  
OF AMERICA, LOCAL 25; LOS ANGELES  
COUNTY DISTRICT COUNCIL OF CARPENTERS  
UNITED BROTHERHOOD OF CARPENTERS  
AND JOINERS OF AMERICA, AFL-CIO; EARL  
GEORGE DALEY, BENJAMIN FENWICK;  
GEORGE WILK; JAMES KEEN; and KENNETH  
SCOTT, answering for themselves alone and no  
other defendants; admit and allege as follows:

1. Defendants deny generally and  
specifically paragraphs 1, 2, 4, 5, 10 and 11  
of Plaintiff's complaint.

2. Answering paragraph 12, Defendants  
deny generally and specifically said paragraph  
as it refers to paragraphs 1, 2, 4, 5, 10 and 11  
of Plaintiff's complaint.

3. Defendants deny generally and  
specifically paragraphs 13, 14, 15 and 16 of  
Plaintiff's complaint.



FIRST AFFIRMATIVE DEFENSE

Plaintiff's complaint fails to state facts sufficient to constitute a cause of action. The

[CT 206]\*

Court has no jurisdiction\* over the subject matter in Plaintiff's complaint in that the subject matter is exclusively within the jurisdiction of the National Labor Relations Board and Federal Courts.

THIRD AFFIRMATIVE DEFENSE

The complaint fails to state a cause of action as Plaintiff has failed to exhaust his internal administrative remedies provided by the by-laws of the Los Angeles County District Council of Carpenters and United Brotherhood of Carpenters AFL-CIO.

WHEREFORE, Defendants pray that Plaintiff take nothing by his complaint, that the complaint be dismissed and for such other and further relief as the Court may deem proper.

DATED June 20, 1972.

GEFFNER & SATZMAN  
A Professional Corporation

BY  
BRADLEY TABACH-BANK  
Attorneys for Defendants

[Proof of Service Omitted in Printing]

EXCERPT FROM PLAINTIFF'S  
FIRST SUPPLEMENTAL INTER-  
ROGATORIES TO DEFENDANTS

Propounded November 5, 1969

[Caption Omitted in Printing]

[CT 478]

7. Do you contend that Mr. Hill has failed to take certain procedural steps within the Union framework which you contend to be conditions precedent to his right to bring this legal action?

a. If yes, please set forth in

[CT 479]\*

detail, each and every\* procedural step you contend was omitted by Mr. Hill.

b. If yes, please state or cite the authority which you contend supports your position that Mr. Hill failed to take certain necessary procedural steps.

c. If yes, exactly which steps do you contend are prerequisites to Mr. Hill's filing this legal action.

EXCERPT FROM ANSWER OF  
DEFENDANT E.G.DALEY TO  
FIRST SUPPLEMENTAL  
INTERROGATORIES

---

[Caption Omitted in Printing]

[CT 483]

7. Yes

(a) Mr. Hill failed to file at any time charges with the Los Angeles County District Council of Carpenters against myself as he is entitled to do under the Constitution of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, and the By-laws of the Los Angeles County District Council of Carpenters.

(b) The Constitution of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, the By-laws of the Los Angeles County District Council of Carpenters, and the hiring procedures of the Los Angeles County District Council of Carpenters, Local 25.

(c) Mr. Hill was required to file charges against me that I discriminated against him and did not fulfill my obligations as a union member and officer of Local 25.

JURY INSTRUCTIONS GIVEN

[CT 498]

BAJI 1.00

RESPECTIVE DUTIES OF JUDGE  
AND JURY

Ladies and Gentlemen of the Jury:

It is my duty to instruct you in the law that applies to this case and you must follow the law as I state it to you.

As jurors it is your exclusive duty to decide all questions of fact submitted to you and for that purpose to determine the effect and value of the evidence.

You must not be influenced by sympathy, prejudice or passion.

[CT 499]

BAJI 1.01

INSTRUCTIONS TO BE CON-  
SIDERED AS A WHOLE

It in these instructions any rule, direction or idea is repeated or stated in varying ways, no emphasis thereon is intended by me and none must be inferred by you. For that reason you

are not to single out any certain sentence or any individual point or instruction and ignore the others, but you are to consider all the instructions as a whole and are to regard each in the light of all the others.

The order in which the instructions are given has no significance as to their relative importance.

[CT 500]

#### BAJI 1.02

##### STATEMENTS OF COUNSEL-- EVIDENCE STRICKEN OUT-- INSINUATIONS OF QUESTIONS

You must not consider as evidence any statement of counsel made during the trial; however, if counsel for the parties have stipulated to any fact, or any fact has been admitted by counsel, you will regard that fact as being conclusively proved as to the party or parties making the stipulation or admission.

As to any question to which an objection was sustained, you must not speculate as to what the answer might have been or as to the reason for the objection.

You must not consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken out by the court; such matter is to be treated as though you had never

known of it.

You must never speculate to be true any insinuation suggested by a question asked a witness. A question is not evidence and may be considered only as it supplies meaning to the answer.

[CT 501]

#### BAJI 1.20

##### "PLAINTIFF" AND "DEFENDANT" APPLIES TO EACH SIMILARLY DESIGNATED

The words "plaintiff" and "defendant", as used in these instructions, apply to each plaintiff and to each defendant, respectively, except as you may be otherwise instructed.

[CT 502]

#### BAJI 2.00

##### DIRECT AND CIRCUMSTANTIAL EVIDENCE--INFERENCES

Evidence may be either direct or circumstantial. It is direct evidence if it proves a fact, without an inference, and which in itself, if true, conclusively establishes that fact. It is circumstantial evidence if it proves a fact from which an inference of the existence of another fact may be drawn.



An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts established by the evidence.

The law makes no distinction between direct and circumstantial evidence as to the degree of proof required; each is accepted as a reasonable method of proof and each is respected for such convincing force as it may carry.

[CT 503]

BAJI 2.01

WEIGHING CONFLICTING TESTIMONY

You are not bound to decide in conformity with the testimony of a number of witnesses, which does not produce conviction in your mind, as against the testimony of a lesser number or other evidence, which appeals to your mind with more convincing force. The testimony of one witness worthy of belief is sufficient for the proof of any fact. This does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice, or from a desire to favor one side as against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence.

[CT 504]

PLAINTIFF'S SPECIAL INSTRUCTION NO.

\*BAJI 2.02

FAILURE TO PRODUCE AVAILABLE STRONGER EVIDENCE

If weaker and less satisfactory evidence is offered by a party, when it was within his power to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust.

[CT 505]

PLAINTIFF'S SPECIAL INSTRUCTION NO.

\*BAJI 2.03

WILFUL SUPPRESSION OF EVIDENCE

If you should find that a part wilfully suppressed evidence in order to prevent its being presented in this trial, you may consider such suppression in determining what inferences to draw from the evidence or facts in the case against him.

[CT 506]

BAJI 2.06

DEPOSITION TESTIMONY

Certain testimony has been read into evidence from a deposition. A deposition is testimony taken under oath before the trial and preserved in writing. You are to consider that testimony as if it had been given in court.

[CT 507]

INTERROGATORIES

During the course of the trial you have heard reference made to the word "interrogatory". An interrogatory is a written question asked by one party of another, who must answer it under oath in writing. You are to consider interrogatories and the answers thereto the same as if the questions had been asked and answered here in court.

[CT 508]

BAJI 2.20

CREDIBILITY OF WITNESS

You are the sole and exclusive judges of the credibility of the witnesses who have testified in this case.

In determining the credibility of a witness you may consider any matter that has a tendency in reason to prove or disprove the truthfulness of his testimony, including but not limited to the following:

His demeanor while testifying and the manner in which he testifies;

The character of his testimony;

The extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies;

The extent of his opportunity to perceive any matter about which he testifies;

His character for honesty or veracity or their opposites;

The existence or nonexistence of a bias, interest, or other motive;

A statement previously made by him that is consistent with his testimony;

A statement made by him that is inconsistent with any part of his testimony;

The existence or nonexistence of any fact testified to by him;

His attitude toward the action in which he testifies or toward the giving of testimony;

His admission of untruthfulness.

[CT 509]

BAJI 2.21

DISCREPANCIES IN TESTIMONY

Discrepancies in a witness's testimony or between his testimony and that of others [if there were any] do not necessarily mean that the witness should be discredited. Failure of recollection is not uncommon. It is a fact, also, that two persons witnessing an incident or a transaction often will see or hear it differently. Whether a discrepancy pertains to a fact of importance or only to a trivial detail should be considered in weighing its significance.

[CT 510]

BAJI 2.22

WITNESS WILFULLY FALSE

A witness false in one part of his testimony is to be distrusted in others; that is to say, you may reject the whole testimony of a witness who wilfully has testified falsely as to a material point, unless, from all the evidence, you shall believe that the probability of truth favors his testimony in other particulars.

[CT 511]

BAJI 2.25

EXTRAJUDICIAL ADMISSIONS--  
CAUTIONARY INSTRUCTION

Evidence of the oral admissions of a party, other than his own testimony in this trial, ought to be viewed by you with caution.

[CT 512]

BAJI 2.40

EXPERT TESTIMONY--  
QUALIFICATIONS OF EXPERT

A witness who has special knowledge, skill, experience, training or education in a particular science, profession or occupation may give his opinion as an expert as to any matter in which he is skilled. In determining the weight to be given such opinion you should consider the qualifications and credibility of the expert and the reasons given for his opinion. You are not bound by such opinion. Give it the weight, if any, to which you deem it entitled.



[CT 513]

BAJI 2.42

### HYPOTHETICAL QUESTIONS

Questions have been asked in which an expert witness was asked to assume that certain facts were true and to give an opinion based upon that assumption. This is called a hypothetical question. If any fact assumed in the question has not been established by the evidence, you should determine the effect of that omission upon the value of the opinion.

[CT 514]

BAJI 2.43

### STATEMENTS MADE BY PATIENT TO PHYSICIAN

Testimony by a physician of statements made to him by a patient for the purpose of diagnosis or treatment may be considered by you not to show the truth of the facts stated but to show the information upon which the physician based his opinions; except that the patient's statements of his then existing state of mind, emotion, or physical sensation, [and any statements made by him which constituted an admission of a fact or facts adverse to his interest] may be considered by you as evidence of the truth of the matter stated.

[CT 515]

(Two Pages) BAJI 2.60 (Page One)

### BURDEN OF PROOF AND PRE- PONDERANCE OF EVIDENCE

In this action, the plaintiff has the burden of establishing by a preponderance of the evidence all of the facts necessary to prove the following issues:

1. The defendants intentionally and by outrageous conduct inflicted upon plaintiff severe emotional distress
2. That the said conduct of the defendants was the proximate cause of injury and damage to the plaintiff and
3. The nature and extent of the injuries and damages claimed to have been so suffered.

[CT 516]

(Two Pages) BAJI 2.60 (Page Two)

By a preponderance of the evidence is meant such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth. In the event that the evidence is evenly balanced so that you are unable to say that the evidence on either side of an issue preponderates, then your finding upon that issue must be against the party who

had the burden of proving it.

In determining whether an issue has been proved by a preponderance of the evidence, you should consider all of the evidence bearing upon that issue regardless of who produced it.

[CT 517]

BAJI 3.76

#### LEGAL CAUSE-DEFINITION OF

A legal cause of an injury is a cause which is a substantial factor in bringing about the injury.

[CT 518]

#### PLAINTIFF'S SPECIAL INSTRUCTION NO.

An agent is one who represents another, called the principal, in dealing with third persons.

California Civil Code Section 2295

[CT 519]

#### PLAINTIFF'S SPECIAL INSTRUCTION NO.

The determination of an agency relationship is not dependent upon proof of compensation, but it may be shown by conduct of the parties.

Vargas vs. Ruggiero, 197 Cal.App.2d 709,  
17 Cal.Rptr. 568

[CT 520]

#### PLAINTIFF'S SPECIAL INSTRUCTION NO.

You are instructed that whether an agency relationship exists is a question of fact to be determined from relevant written documents and the conduct of the parties in evidence. It may be created formally or informally. The right to control is the primary test of agency. It is not necessary that the principal exercise its right of control...

Housewright vs. Pacific Far East Lines Inc., 222 Cal.App.2d 306, 40 Cal.Rptr. 208

Malloy vs. Fong, 101 Cal.App. 232 P.2d 241

[CT 521]

BAJI 14.00

#### COMPENSATORY DAMAGES-- PERSONAL INJURY AND PROPERTY DAMAGE--INTRODUCTORY

If, under the court's instructions, you find that plaintiff is entitled to a verdict against defendant, you must then award plaintiff damages in an amount that will reasonably compensate him for each of the following elements of claimed loss or harm, provided that you find it was suffered by him and proximately caused by the act or omission

upon which you base your finding of liability.  
The amount of such award shall include:

[CT 522]

BAJI 14.10

MEASURE OF DAMAGES--  
PERSONAL INJURY--  
EXPENSES INCURRED

The reasonable value of medical [hospital and nursing] care, services and supplies reasonably required and actually given in the treatment of the plaintiff

[CT 523]

BAJI 14.13

MEASURE OF DAMAGES--  
PERSONAL INJURY--  
PAIN AND SUFFERING

Reasonable compensation for any pain, discomfort, fears, anxiety and other mental and emotional distress suffered by the plaintiff and of which his injury was a proximate cause.

No definite standard is prescribed by law by which to fix reasonable compensation for pain and suffering. Nor is the opinion of any witness required as to the amount of such reasonable compensation. [Furthermore, the argument of counsel as to the amount of damages

is not evidence of reasonable compensation.] In making an award for pain and suffering you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in the light of the evidence.

[CT 524]

PLAINTIFF'S SPECIAL INSTRUCTION NO.

Damages may be awarded for the suffering of severe emotional distress caused by intentional and outrageous conduct.

Vargas vs. Ruggiero, 197 Cal. App. 2d 709, 17 Cal. Rptr. 568

Fletcher vs. Western National Life Insurance Company 10, Cal. App. 2d 376, 89 Cal. Rptr. 78

[CT 525]

PLAINTIFF'S SPECIAL INSTRUCTION NO.

The nature of the conduct which allegedly caused severe emotional distress may consist in acts alone, or acts accompanied by words, or it may consist of words alone,

Emdem vs. Vitz, 88 Cal. App. 2d 313, 198 P. 2d 696 (hearing denied)  
Bowden vs. Spiegel, Inc., 96 Cal. App. 2d 793, 216 P. 2d 571.



[CT 526]

BAJI 14.65

DAMAGES--AGGRAVATION OF  
PREEXISTING CONDITION

A person who has a condition or disability at the time of an injury is not entitled to recover damages therefor. However, he is entitled to recover damages for any aggravation of such preexisting condition or disability proximately resulting from the injury.

This is true even if the person's condition or disability made him more susceptible to the possibility of ill effects than a normally healthy person would have been, and even if a normally healthy person probably would not have suffered any substantial injury.

Where a pre-existing condition or disability is so aggravated, the damages as to such condition or disability are limited to the additional injury caused by the aggravation.

Defendants are liable only for that emotional distress actually caused by their own conduct.

[CT 527]

PLAINTIFF'S SPECIAL INSTRUCTION NO.

"Severe emotional distress" as will permit you to find for a Plaintiff, must in fact exist and it must be severe; it may consist of any highly unpleasant mental reaction such as fright, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment or worried. [Sic.]

Fletcher vs. Western National Life  
Insurance Company 10, Cal. App. 2d 376,  
89 Cal. Rptr. 78, 90  
Crisci vs. Sec. Ins. Co., 66, Cal. 2d  
425, 58 Cal. Rptr. 13

[CT 528]

PLAINTIFF'S SPECIAL INSTRUCTION NO.

"Severe" means, in this context, substantial or enduring, as distinguished from trivial or transitory. It must be of such substantial quantity or enduring quality that no reasonable man in a civilized society should be expected to endure it. Liability does not extend to mere insults, indignities, annoyances, petty or other trivialities.

Fletcher vs. Western National Life  
Insurance Company 10, Cal. App. 2d  
376, 89 Cal. Rptr. 78, 90, 91

[CT 529]

DEFENDANTS' REQUESTED  
SPECIAL INSTRUCTION

No. \_\_\_\_\_

In the event you find that the plaintiff is entitled to a verdict, you are not to consider any award regarding any actual damages regarding the plaintiff's emotional and mental distress as may or may not exist after April 17th, 1969.

[CT 530]

DEFENDANTS' REQUESTED  
SPECIAL INSTRUCTION

No. \_\_\_\_\_

In the event you should find that the plaintiff is entitled to a verdict, you are not to consider any loss of wages or salaries by the plaintiff as the plaintiff has not made any claim for such loss in the complaint.

[CT 531]

PLAINTIFF'S SPECIAL INSTRUCTION NO.

There has been received in evidence the fact that Plaintiff filed a complaint within the National Labor Relations Board, a governmental agency, and received an award covering wages he would have earned on the Dinwiddy-Simpson job had he been dispatched on May 1, 1967.

The National Labor Relations Board is empowered by law to render awards to compensate for lost wages where it finds that a claimant was unreasonably denied employment in violation of certain applicable federal laws.

The Plaintiff in this action charges the intentional infliction [sic] of severe emotional distress and seeks damages for pain and suffering, for resulting medical expenses incurred, and for punitive damages. The National Labor Relations Board has limited jurisdiction which does not include the authority to render awards for any of the just-mentioned items of damage.

[CT 532]

PLAINTIFF'S SPECIAL INSTRUCTION NO.

You are instructed that a trade union acts through and is bound by the acts of its officers.

Coates vs. Construction and General  
Laborers Local 185, (1971) 93 Cal.  
Rptr. 639, 642, 15 Cal. App. 3d 908,  
re hearing denied

[CT 533]

PLAINTIFF'S SPECIAL INSTRUCTION NO.

For Plaintiff to prevail in this action against Defendants Local 25 or the Los Angeles District Council of Carpenters it is necessary for the Plaintiff to establish by a preponderance

of the evidence that the agent was acting within the scope of his employment or authority at the time the complained of acts were committed. To determine this issue you should consider (a) whether his conduct was authorized by his principal, either expressly or impliedly, (b) whether his conduct occurred during the performance of services for the benefit of the principal, either directly or indirectly, (c) whether his conduct, even though not expressly or impliedly authorized, was an incidental event connected with his assigned work.

Coates vs. Construction and General Laborers Local 185, (1971) 93 Cal. Rptr. 639, 642, 15 Cal. App. 3d 908, re hearing denied

[CT 534]

PLAINTIFF'S AND DEFENDANTS' JOINTLY  
DRAWN INSTRUCTION NO.

The Defendant Los Angeles District Council of Carpenters has been sued on the theory that it was the principal and that Defendants, Daley, Wilk and Fenwick were its agents.

If you determine that Defendant Daley was the agent of Defendant Los Angeles District Council of Carpenters and was acting in the scope of his authority at the time the conduct complained of occurred and if you find that Defendant Daley is liable, then Defendant

Los Angeles District Council of Carpenters is also liable. But if you find Defendant Daley is not liable, then Defendant Los Angeles District Council of Carpenters is not liable.

However, if you determine that Defendant Daley is liable but was not then the agent of Defendant Los Angeles District Council of Carpenters or was not acting within the scope of his authority at such time, then you must find that Los Angeles District Council of Carpenters is not liable.

[CT 535]

PLAINTIFF'S AND DEFENDANTS' JOINTLY  
DRAWN INSTRUCTION NO.

The Defendant Los Angeles District Council of Carpenters has been sued on the theory that it was the principal and that Defendants Daley, Wilk and Fenwick were its agents.

If you determine that Defendant Wilk was the agent of Defendant Los Angeles District Council of Carpenters and was acting in the scope of his authority at the time the conduct complained of occurred, and if you find that Defendant Wilk is liable, then Defendant Los Angeles District Council of Carpenters if [sic] also liable. But, if you find Defendant Wilk is not liable, then Defendant Los Angeles District Council of Carpenters is not liable.



However, if you determine that Defendant Wilk is liable but was not then the agent of Defendant Los Angeles District Council of Carpenters or was not acting within the scope of his authority at such time, then you must find that Los Angeles District Council of Carpenters is not liable.

[CT 536]

PLAINTIFF'S AND DEFENDANTS' JOINTLY  
DRAWN INSTRUCTION NO.

The Defendant Los Angeles District Council of Carpenters has been sued on the theory that it was the principal and that Defendants Daley, Wilk and Fenwick were its agents.

If you determine that Defendant Fenwick was the agent of defendant [sic] Los Angeles District Council of Carpenters and was acting in the scope of his authority at the time the conduct complained of occurred, and if you find that Defendant Fenwick is liable, then Defendant Los Angeles District Council of Carpenters is also liable. But, if you find Defendant Fenwick is not liable, then Defendant Los Angeles District Council of Carpenters is not liable.

However, if you determine that Fenwick is liable but was not then the agent of Defendant Los Angeles District Council of Carpenters or was not acting within the scope of his authority at such time, then you must find that Los Angeles District Council of Carpenters is not liable.

[CT 537]

PLAINTIFF'S AND DEFENDANTS' JOINTLY  
DRAWN INSTRUCTION NO.

The Defendant Local 25 has been sued on the theory that it was the principal and Defendants Daley, Wilk and Fenwick were its agents.

It has been stipulated that Daley, Wilk and Fenwick are agents of Carpenters Local 25.

If you determine that Defendant Daley was acting in the scope of his employment at the time the conduct complained of occurred, and if you find that Defendant Daley is liable, then Local 25 is also liable. But, if you find the Defendant Daley is not liable, then Local 25 is not liable.

However, if you determine that Defendant Daley is liable but was not acting within the scope of his employment at such time, then you must find that Local 25 is not liable.

[CT 538]

PLAINTIFF'S AND DEFENDANTS' JOINTLY  
DRAWN INSTRUCTION NO.

The Defendant Local 25 has been sued on the theory that it was the principal and Defendants Daley, Wilk and Fenwick were its agents.

It has been stipulated that Daley, Wilk and Fenwick are agents of Carpenters Local 25.

If you determine that Defendant Wilk was acting in the scope of his employment at the time the conduct complained of occurred, and if you find that Defendant Wilk is liable, then Local 25 is also liable. But, if you find that Defendant Wilk is not liable, then Local 25 is not liable.

However, if you determine that Defendant Wilk is liable but was not acting within the scope of his employment at such time, then you must find that Local 25 is not liable.

[CT 539]

PLAINTIFF'S AND DEFENDANTS' JOINTLY  
DRAWN INSTRUCTION NO.

The Defendant Local 25 has been sued on the theory that it was the principal and Defendants Daley, Wilk and Fenwick were its agents.

It has been stipulated that Daley, Wilk and Fenwick are agents of Carpenters Local 25.

If you determine that Defendant Fenwick was acting in the scope of his employment at the time the conduct complained of occurred, and if you find that Defendant Fenwick is liable, then Local 25 is also liable. But, if you find that Defendant Fenwick is not liable, then Local 25 is not liable.

However, if you determine that Defendant Fenwick is liable but was not acting within the scope of his employment at such time, then you must find that Local 25 is not liable.

[CT 540]

\*BAJI 14.71

PUNITIVE DAMAGES - RECOVERY  
OF AND MEASURE

If you find that Plaintiff has suffered actual damage as a proximate result of the acts of Defendants on which you base your finding of liability, you may in your sole discretion award additional damages against Defendants as punitive or exemplary damages, for sake of example and by way of punishing Defendants if, and only if, you find by a preponderance of the evidence that said Defendants have been guilty of oppression or actual malice.

["Malice" means a motive and willingness to vex, harass, annoy, or injure another person. Malice may be shown by direct evidence of declarations of hatred or ill-will or it may be inferred from acts and conduct, such as by showing that the Defendants' conduct was wilful, intentional, and done in reckless disregard of its possible results.]

The law provides no fixed standard as to the amount of such punitive damages, but leaves the amount to the jury's sound [sic] discretion,

exercised without passion or prejudice.

[CT 541]

PLAINTIFF'S SPECIAL INSTRUCTION NO.

A principal may be held in punitive damages for the wilfull and malicious acts of its agent when it has knowledge of the conduct of such conduct, and it approves such conduct. Approval of the conduct may take the form of a failure to act when in a position to remedy the situation. Maintaining the agent in the service of the principal alone, does not make the principal liable for punitive damages, but it is an indication of the principal's approval of the complained of conduct and when considered with other acts of the principal may, in your discretion, make the principal liable in punitive damages.

Coates vs. Construction and General Laborers Local 185, (1971) 93 Cal. Rptr. 639, 642, 15 Cal. App. 3d 908, re hearing denied.

[CT 542]

PLAINTIFF'S SPECIAL INSTRUCTION NO.

In assessing punitive damages, if any, you may consider the character of the Defendants' acts, the nature and extent of the harm actually caused the Plaintiff, and the wealth of the Defendant.

Coates vs. Construction and General Laborers Local 185, (1971) 93 Cal. Rptr. 639, 642, 15 Cal. App. 3d 908, re hearing denied.

[CT 543]

PLAINTIFF'S SPECIAL INSTRUCTION NO.

One of the factors you may consider in determining the presence or absence of malice or oppression on the part of the defense is the relation of authority and the duties owed, if any, by the Defendants toward the Plaintiff.

Another factor you may also consider is whether the Defendants were aware, or reasonably should have been aware of the Plaintiff's particular susceptibility, if any, to emotional distress.

Alcorn vs. Ambro Engineering Company, 2 Cal. 3d 493, 86 Cal. Rptr. 88, 90, 91

Fletcher vs. Western National Life Insurance Company 10, Cal. App. 2d 376, 89 Cal. Rptr. 78, 91, 93.

[CT 544]

BAJI 15.02

EACH DEFENDANT ENTITLED TO SEPARATE CONSIDERATION

Although there is more than one defendant in this suit, it does not follow from the fact alone that if one is liable [all] are liable. Each defendant is entitled to a fair and separate consideration of his own defense and is not to be



prejudiced by your decision as to the other[s].  
The instructions govern the case as to each  
defendant so far as they are applicable to him,  
unless otherwise stated.

You will decide each defendant's case  
separately.

[CT 545]

BAJI 15.03

CONTRIBUTORY TORT-FEASORS--  
DAMAGES NOT APPORTIONED

If you find that plaintiff is entitled to  
recover against more than one defendant, you  
must return a verdict in a single sum against  
the defendants whom you find to be liable.

[CT 546]

BAJI 15.20

JURY NOT TO TAKE CUE FROM  
JUDGE

I have not intended by anything I have  
said or done, or by any questions that I may  
have asked, to intimate or suggest how you  
should decide any questions of fact submitted  
to you, or that I believe or disbelieve any witness.

If anything I have done or said has seemed  
so to indicate, you will disregard it and form your  
own opinion.

[CT 547]

BAJI 15.22

ALL INSTRUCTIONS NOT  
NECESSARILY APPLICABLE

The court has given you instructions  
embodying various rules of law to help guide you  
to a just and lawful verdict. Whether some of  
these instructions will apply will depend upon  
what you find to be the facts. The fact that I  
have instructed you on various subjects in this  
case [including that of damages] must not be  
taken as indicating an opinion of the court as to  
what you should find to be the facts or as to  
which party is entitled to your verdict.

[CT 548]

BAJI 15.30

JURORS TO DELIBERATE

When you go to the jury room it is your  
duty to discuss the case for the purpose of  
reaching an agreement if you can do so.

Each of you must decide the case for  
yourself, but should do so only after a considera-  
tion of the case with the other jurors.

You should not hesitate to change an  
opinion if you are convinced it is erroneous.  
However, you should not be influenced to decide

any question in a particular way simply because a majority of the jurors, or any of them, favor such a decision.

[CT 549]

BAJI 15.31

HOW JURORS SHOULD APPROACH  
THEIR TASK

The attitude and conduct of jurors at the outset of their deliberations are matters of considerable importance. It is rarely productive of good for a juror, upon entering the jury room, to make an emphatic expression of his opinion on the case or to announce a determination to stand for a certain verdict. When one does that at the outset, his sense of pride may be aroused, and he may hesitate to recede from an announced position if shown that it is wrong. Remember that you are not partisans or advocates in this matter, but are judges.

[CT 550]

EACH JUROR SHOULD DELIBERATE  
AND VOTE ON EACH ISSUE TO BE  
DECIDED

Each of you should deliberate and vote on each issue to be decided.

However, before you may return a verdict to the court, at least nine jurors must agree on it

in its final and complete form, so that each of those nine or more may be able to state truthfully that the verdict is his.

[CT 551]

BAJI 15.33

CHANCE OR QUOTIENT VERDICT  
PROHIBITED

The law forbids you to determine any issue in this case by chance. Thus, if you determine that a party is entitled to recover, you must not arrive at the amount of damages to be awarded by agreeing in advance to take the independent estimate of each juror of the amount to be awarded, then to total such estimates, divide such total by twelve and to make such resulting average the amount of your award.

[CT 552]

BAJI 15.50

CONCLUDING INSTRUCTION

You shall now retire and select one of your number to act as foreperson who will preside over your deliberations. As soon as nine or more of you shall have agreed upon a verdict, you shall have it signed and dated by your foreperson and then shall return with it to this room.

JURY INSTRUCTIONS REFUSED OR WITHDRAWN

[CT 553]

BAJI 13.01

SCOPE OF AUTHORITY-MEANING

It is not necessary that a particular act or failure to act be expressly authorized by the principal to bring it within the scope of the agent's [authority]. Such conduct is within the scope of his [authority] if it occurs while the agent is engaged in the duties which he was employed to perform and relates to those duties. Conduct for the benefit of the principal which is incidental to, customarily connected with or reasonably necessary for the performance of an authorized act is within the scope of the agent's [authority].

[CT 554]

BAJI 13.06

CONTESTED ISSUE OF IMPUTATION  
TO DEFENDANT--BOTH PRINCIPAL  
AND AGENTS SUED

The defendant Local #25 has been  
(principal)  
sued on the theory that it was the principal and  
that the defendants Daley, Wilks and Fenwick  
(agent)  
were its agents. It has been stipulated that  
Daley, Wilks and Fenwick were agents of [sic.]

If you determine that defendants  
Daley, Wilks or Fenwick, or any of them [was  
(agent)  
acting within the scope of his employment] at the  
time of the events out of which the accident  
occurred, and if you find that defendant  
\_\_\_\_\_ is liable, then both  
\_\_\_\_\_ (agent)  
defendants are liable. But if you find that  
defendant \_\_\_\_\_ is not liable  
\_\_\_\_\_ (agent)  
then neither defendant is liable.

However, if you determine that defendant  
\_\_\_\_\_ is liable but [was not  
(agent)  
then the agent of defendant \_\_\_\_\_ ]  
(principal)  
[or] [was not acting within the scope of his  
employment] at such time, then you must find  
that the defendant \_\_\_\_\_ is not liable.  
\_\_\_\_\_ (principal)

[CT 555]

BAJI 13.03

DIRECTED IMPUTATION AGAINST  
A DEFENDANT PRINCIPAL--BOTH  
PRINCIPAL AND AGENT SUED--  
NO ISSUE AS TO AGENCY OR  
SCOPE OF EMPLOYMENT



The defendants are sued as principal and agent, the defendants International District and  
(principal)

Local as the principal and the defendants  
Daley, Wilk and Fenwick as their agents.  
(agent)

If you determine that either of defendant  
agents is liable, then you must  
(agent)  
find that defendant  
(principal)  
is also liable. However, if you determine that  
defendant is not liable,  
(agent)  
then you must find that defendant  
is not liable. (principal)

[CT 556]

PLAINTIFF'S AND DEFENDANTS' JOINTLY  
DRAWN INSTRUCTION NO.

The Defendant United Brotherhood of Carpenters and Joiners of America has been sued on the theory that it was the principal and that Defendants Daley, Wilk and Fenwick were its agents.

If you determine that Defendant Fenwick was the agent of Defendant United Brotherhood of Carpenters and was acting in the scope of his authority at the time the conduct complained of occurred, and if you find that Defendant Fenwick

is liable, then Defendant, United Brotherhood of Carpenters is also liable. But, if you find Defendant Fenwick is not liable, then Defendant United Brotherhood of Carpenters is not liable.

However, if you determine that Defendant Fenwick is not liable but was not then the agent of Defendant United Brotherhood of Carpenters or was not acting within the scope of his authority at such time, then you must find that United Brotherhood of Carpenters is not liable.

[CT 557]

PLAINTIFF'S AND DEFENDANTS' JOINTLY  
DRAWN INSTRUCTION NO.

The Defendant United Brotherhood of Carpenters and Joiners of America has been sued on the theory that it was the principal and that Defendants Daley, Wilk and Fenwick were its agents.

If you determine that Defendant Wilk was the agent of Defendant United Brotherhood of Carpenters and was acting in the scope of his authority at the time the conduct complained of occurred, and if you find that Defendant Wilk is liable, then Defendant United Brotherhood of Carpenters is also liable. But, if you find Defendant Wilk is not liable, then Defendant United Brotherhood of Carpenters is not liable.

However, if you determine that Defendant Wilk is liable but was not then the agent of

Defendant United Brotherhood of Carpenters or was not acting within the scope of his authority at such time, then you must find that United Brotherhood of Carpenters is not liable.

[CT 558]

PLAINTIFF'S AND DEFENDANT'S JOINTLY  
DRAWN INSTRUCTION NO.

The Defendant United Brotherhood of Carpenters and Joiners of America has been sued on the theory that it was the principal and that Defendants Daley, Wilk and Fenwick were its agents.

If you determine that Defendant Daley was the agent of Defendant United Brotherhood of Carpenters and was acting in the scope of his authority at the time the conduct complained of occurred, and if you find that Defendant Daley is liable, then Defendant United Brotherhood of Carpenters is also liable. But, if you find Defendant Daley is not liable, then Defendant United Brotherhood of Carpenters is not liable.

However, if you determine that Defendant Daley is liable but was not then the agent of Defendant United Brotherhood of Carpenters or was not acting in the scope of his authority at such time, then you must find that United Brotherhood of Carpenters is not liable.

[CT 559]

DEFENDANTS' REQUESTED SPECIAL  
INSTRUCTION NO. \_\_\_\_\_

You are directed to enter a verdict for the United Brotherhood of Carpenters and Joiners of America, AFL-CIO.

[CT 560]

DEFENDANTS' REQUESTED SPECIAL  
INSTRUCTION NO. \_\_\_\_\_

In determining whether the Plaintiff has satisfied the burden of proof regarding liability of any defendants in this case, you are not to consider any evidence regarding discrimination concerning employment opportunities or hiring either on the basis of the general dispatching procedures of the Defendants Carpenters Union Local 25, or its business agents, or regarding any operation of the dispatching procedures concerning the Plaintiff.

Note:

The above instruction is based on the Rule of Pre-emption that all matters involving dispatching procedures, hiring and termination regarding employees and members of the Carpenters Union concerning any contractors or employers in interstate commerce, a matter within the exclusive jurisdiction of the National Labor Relations Board and the Federal Courts and the State Courts, including any jury deliberations are without jurisdiction in this matter. [Sic.]

[CT 561]

DEFENDANTS' REQUESTED SPECIAL  
INSTRUCTION NO. \_\_\_\_\_

In determining whether the Plaintiff has satisfied the burden of proof, you are not to consider the general procedures and practices of the hiring hall of Carpenters Union Local 25, or any of its business agents. The only evidence you are to consider are evidence relating to the Plaintiffs individually regarding the alleged act of discrimination concerning his employment.[Sic.]

Note:

The above instruction is offered as an alternative to the previously offered instruction on pre-emption as the general practices of the hiring hall of the Carpenters Union is a matter under the doctrine of pre-emption within the exclusive jurisdiction of the National Labor Relations Board and the Federal Courts. In determining any liability regarding an intentional act under California law, the State Court including jury deliberation cannot consider general practices of a Carpenters Union hiring hall but can only consider individual acts of discrimination that relate to the Plaintiff concerning any intentional infliction of emotional distress. [Sic.]

(CT 562)

PLAINTIFF'S SPECIAL INSTRUCTION NO.

Oppression, as used in these instructions is defined as an unjust or cruel exercise of

authority or power subjecting the recipient to unreasonable hardship.

Roth vs. Shell Oil Company, 185 Cal.  
App.2d 676, 8 Cal.Rptr. 514

Baker vs. Peck, 1 Cal.App.2d 231,  
36 P.2d 404

[CT 563]

PLAINTIFF'S SPECIAL INSTRUCTION NO.

Malice is defined as a wish to vex, annoy or injure another person, and may be proved by direct evidence of the evil motive and intent or by legitimate inferences to be drawn from the surrounding facts and circumstances in evidence.

Fletcher vs. Western National Life  
Insurance Company, 10 Cal.App.3d 376,  
89 Cal.Rptr. 78

[CT 564]

DEFENDANTS' REQUESTED SPECIAL  
INSTRUCTION NO. \_\_\_\_\_

If you find that any emotional distress or disturbance of the Plaintiff was not actually caused by any of the course of conduct of the individual defendants, but was in fact caused by other incidents, events or circumstances or by the plaintiff's own actions, you must likewise bring in a verdict for all defendants.



[CT 565]

PLAINTIFF'S SPECIAL INSTRUCTION NO.

In the event you should find the Plaintiff is entitled to a verdict you should award Plaintiff such an amount as will compensate him reasonably for all detriments suffered by him and of which Defendants' conduct was the actual cause.

In arriving at the amount of the award, if any, you shall consider any actual damage which the Plaintiff has proved, and also such sum as will compensate him reasonably for any fears anxiety and other mental and emotional distress, if any, suffered by him and proximately resulting from the conduct in question.

Fletcher vs. Western National Life Insurance Company, 10 Cal. App. 2d 376, 89 Cal. Rptr. 78, 97

[CT 566]

DEFENDANTS' REQUESTED SPECIAL INSTRUCTION NO. \_\_\_\_\_

You are instructed that the Plaintiff has failed to meet the burden of proof and you must find for the Defendants, unless you find that the individual Defendants committed acts that are considered as extreme and outrageous conduct intentionally or recklessly causing severe emotional distress to the Plaintiff. In this regard the law intervenes only where the distress

inflicted is so severe that no reasonable man could be expected to endure it. The intensity and duration of this distress are factors to be considered in its severity. In this connection, "severe" means substantial or enduring as distinguished from trivial or transitory. If you find trivial emotional distress only, you are to find for the Defendants as complete emotional tranquility is seldom obtainable and some degree of transient and trivial emotional distress is a part of the price of living among people. In this regard, the Defendants are liable only where the conduct has been so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community. The reliability of the Defendants regarding any of their acts should not extend to mere insults, indignities, threats, annoyances, petty oppressions or other trivialities. The Plaintiff in our society and within the context of his occupation and associates as a construction worker, must necessarily be expected and required to be hardened to a certain amount of rough language and to occasional acts that are definitely inconsiderate and unkind:

See Golden v. Dungan, 20 CA 3rd 295  
Fletcher v. Western National Life Ins. Co., 10 CA 3rd 376  
Alcorn v. Ambro Engineering Inc., 2 C. 3rd 493

[CT 567]

PLAINTIFF'S SPECIAL INSTRUCTION NO.

In California the principal is liable for the wilful or malicious acts of its agent who is acting in the scope of his employment.

Kaufman vs. Brown, 93 Cal. App. 2d 508, 209 P. 2d 156

Weir vs. Continental Oil Company, 5 Cal. App. 2d 714, 43 P. 2d. 375

Gudger vs. Manton, 21 Cal. 2d 537, 134 P. 2d 217

[CT 568]

BAJI 13.00

AGENT--DEFINITION OF

One is the agent of another person at a given time if he is authorized to act for or in place of such person. [One may be an agent although he receives no payment for his services.] For the purposes of this trial, the term "agent" includes servants and employees and the term "principal" includes employers.

[CT 569]

BAJI 1.11

"SUBJECT TO LIABILITY"--  
MEANING OF

The words "subject to liability", as used in these instructions, mean that [in the absence of certain exceptions or defenses as to which you will be instructed] a defendant is liable for another's injury proximately caused by such defendant's conduct.

[CT 570]

WILLIAM G. SHARP, County Clerk	FILED Date February 3, 1973
Entered Book Page	WILLIAM G. SHARP, County Clerk
Feb 5 '73 6798 358	Vera C. Chappelle Deputy

SUPERIOR COURT OF THE STATE OF  
CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES

RICHARD T HILL	Case Number
Plaintiff(s)	951866
vs	
UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, ET AL	JUDGMENT ON VERDICT IN OPEN COURT (LONG FORM)
Defendant(s)	

This action came on regularly for trial on December 11, 1972; in Department 68 of the above entitled Court, the Honorable Robert W. Kenny Judge presiding; the plaintiff(s) appearing by attorney G. Dana Hobart and the defendant(s) appearing by attorney Leo Geffner of Geffner & Satzman

A jury of 12 persons was regularly impaneled and sworn to try the action. Witnesses on the part of the plaintiff(s) and the defendant(s) were sworn and examined. After hearing the evidence, the argument of counsel, and instructions of the Court, the jury retired to consider of their verdict, and subsequently returned into Court, and being called answered to their names and duly rendered their verdict in writing in words and figures as follows, to-wit:

"TITLE OF COURT AND CAUSE" We, the jury in the above entitled action, find for the plaintiff, Richard T. Hill, and against defendants Earl George Daley, and United Brotherhood of Carpenters and Joiners of America, Local 25 and Los Angeles District Council of Carpenters, and assess damages in the sum of \$7,500.00

We further assess punitive damages against said defendants in the sum of \$175,000.00;

We further find for defendants Joseph Wilk, Ben Fenwick, and against the plaintiff, Richard T. Hill.

Dated February 2, 1973 Charles C. Schutz,  
Foreman

JUDGMENT ON VERDICT IN OPEN  
COURT



[CT 571]

WHEREFORE, by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged, and decreed that said plaintiff, Richard T. Hill, recover nothing by reason of his complaint against the defendants, Joseph Wilk and Ben Fenwick, and that the defendants, Joseph Wilk and Ben Fenwick, have and recover from said plaintiff, Richard T. Hill, costs and disbursements amounting to the sum of \$\_\_\_\_\_.

Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged, and decreed that said plaintiff, Richard T. Hill, have and recover from the defendants Earl George Daley, United Brotherhood of Carpenters and Joiners of America, Local 25, and Los Angeles District Council of Carpenters, compensatory damages in the sum of \$7,500 with interest thereon at the rate of seven per cent per annum from the date of the verdict until paid together with costs and disbursements amounting to the sum of \$\_\_\_\_\_.

Further, that said plaintiff, Richard T. Hill, have and recover from said defendants, Earl George Daley, United Brotherhood of Carpenters and Joiners of America, Local 25, and Los Angeles District Council of Carpenters, punitive damages in the sum of \$175,000.000 with interest thereon at the rate of seven per cent per annum from the date of the verdict until paid together with costs and disbursements amounting to the sum of \$4,607.31 .

[CT 581]

NOTICE OF MOTION FOR  
NEW TRIAL

Filed February 13, 1973  
[Caption Omitted in Printing]

To Richard T. Hill, plaintiff and to G. Dana Hobart, his attorney:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the defendants, United Brotherhood of Carpenters and Joiners of America, Local 25, the Los Angeles County District Council of Carpenters and E.G. Daley, defendants in the above matter, intend to and will move the Court at a time to be set by the Court, in Department 68, for an order granting a new trial.

The motion will be made upon the following grounds:

1. Irregularity in the proceedings of the Court and the jury and abuse of discretion which prevented the defendants from having a fair trial.
2. Excessive damages.
3. Insufficiency of the evidence to justify the verdict and the verdict is against the law.

4. Error in law occurring at the trial

[CT 582]\*

and excepted\* to by the defendants as the moving parties.

The motion will be based upon the Minutes of the Court and upon the evidence, oral and documentary, as well as all papers, records and documents and exhibits on file herein pursuant to Sections 657, 658, 659 and 660 of the Code of Civil Procedure of the State of California, and upon the Memorandum of Points and Authorities to be submitted in support of this motion.

DATED: February 13th, 1973

GEFFNER & SATZMAN  
A Professional Corporation

By: Leo Geffner  
LEO GEFFNER  
Attorneys for Defendants

[Proof of Service Omitted in Printing]

ORDER OF SUPERIOR COURT  
OF LOS ANGELES COUNTY

Rendered March 15, 1973

[Caption Omitted in Printing]

[CT 644]

MOTION FOR NEW TRIAL AND  
MOTION TO TAX COSTS

In this matter, heretofore submitted March 12, 1973, the Court now makes the following ruling:

Defendant's motion for new trial is denied.

Item 28. Transcript, (partial) NLRB, \$338.25 and

Item 29. Simpson Depo travel costs to San Francisco, \$52.26 are ordered stricken and the cost bill is re-taxed at \$4,607.31.

Copy of this minute order sent to counsel for all appearing parties this date by U.S. mail. Certificate of mailing executed and filed.

[Proof of Service Omitted in Printing]

NOTICE OF APPEAL

Filed March 30, 1973  
[Caption Omitted in Printing]

[CT 645]

NOTICE IS HEREBY GIVEN that Defendants, the Los Angeles County District Council of Carpenters, Carpenters Union Local 25, and Earl George Daley, and each of them in the above-entitled action hereby appeal to the Court of Appeal of the State of California, Second Appellate District, from the Judgment entered against Defendants in favor of Plaintiff and entered on February 5, 1973 in Book 6798, Page 356.

DATED: March 27, 1973

GEFFNER & SATZMAN  
A Professional Corporation

By: Leo Geffner  
LEO GEFFNER  
Attorney for Defendants.

[Proof of Service Omitted in Printing]

Decision and Judgment of Court of Appeal of the State of California, Second Appellate District, Division Five, is reproduced as Appendix A to Petition for Writ of Certiorari.

Order Denying Petition for Hearing in California Supreme Court is reproduced as Appendix B to Petition for Certiorari.



ORAL PROCEEDINGS

SUPERIOR COURT OF THE  
STATE OF CALIFORNIA FOR  
THE COUNTY OF LOS ANGELES

DEPARTMENT NO. 68 HON. ROBERT W.  
KENNY, JUDGE

RICHARD T. HILL, )  
 )  
Plaintiff, )  
 )  
vs. )  
 ) No. 951866  
UNITED BROTHERHOOD OF )  
CARPENTERS AND JOINERS )  
OF AMERICA, LOCAL 25, )  
an unincorporated association, )  
et al., )  
 )  
Defendants. )  
 )

REPORTERS' TRANSCRIPT ON APPEAL

December 12, 13, 14, 15, 18, 19, 20, 21, 26,  
27 and 29, 1972; January 2, 3, 4, 8, 9, 10, 11,  
12, 15, 16, 17, 18, 19, 22, 23, 24, 26, 29, 30  
and 31; February 1 and 2, 1973.

APPEARANCES:

For Plaintiff: COLEMAN, SILVERSTEIN  
& HOBART  
By: G. DANA HOBART  
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Suite 200  
Los Angeles, California 90010  
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For Defendants: GEFNER & SATZMAN  
By: LEO GEFNER  
520 South Virgil Avenue  
Los Angeles, California 90020  
(213) 381-5561

[RT 148]

THE COURT: Good Afternoon.

Does the Plaintiff care to make an opening  
statement?

MR. HOBART: Thank you, your Honor.

Ladies and gentlemen, counsel, as some  
of you know, the opening statement is a time  
when the lawyers for each side have an opportunity  
to present to you what they think the evidence is  
going to unfold as the trial progresses. It is  
given to you more in a sense to acquaint you with  
the overall picture, so that you see how the pieces  
may fit into the general scheme of things.

Sometimes we are surprised. Sometimes the evidence doesn't come out exactly like we think, but I do think, by and large, the evidence will be as I present it to you here.

One of the reasons that the case is going to take as long as it will is because we are going to have to reconstruct for you the dispatching procedures, as well as some of the actual dispatches as they occurred out of the union hall during 1967 and '68, for the most part, and a little bit in 1969.

So the evidence will show, in a sense, an instruction element. That is so you will see what the procedure was, so that you will understand it, and I will discuss that with you now, and it will go

[RT 149]\*

into far more\* elaborate detail.

Basically, the structure is this: The Carpenters, Local 25, which is here off Alvarado Street, is a union hall where members of the Carpenters Union who carry their book -- that just means they get employed out of that local. They have a little book that they present to that local, and they are dispatched from that local. A carpenter could go to virtually any local that would, for one reason or another, fit his needs and fancy, and work out of that local, if there is work, and so forth.

Mr. Hill has worked out of Local 25 since 19- -- well, 1961, I think it was. He's been a

carpenter since 1952. Now, when a contractor, we'll say a man, one of the companies, builds a high-rise building, or virtually anything lower than that, but when they are in the process of building, they will call up on a day-by-day basis to the Carpenters Union. They may call up early in the morning, and they may call up late in the afternoon. If they'd call late in the afternoon, they'd say, "Tomorrow we need five forms men." Forms is one of the types of carpenters, guys to put the forms in, and they pour cement into it, and that sort of thing. You have seen wood structures around the cement foundations on this and that, and various buildings; but at any rate, they call up and say, "Tomorrow send us out five forms men to such and such a location."

Now, the responsibility at this point, then, is the next morning, when the dispatches are actually made from the union, or when they

[RT 150]\*

are supposed to be made from the \* union, the business agent who is in charge of dispatching -- it could be one person on that particular morning, or it may be two, or even possibly three. But generally it's one, sometimes it's two -- that business agent, if he follows the rules, the bylaws, and the contracts and various agreements, he'll go to what's called the out-of-work sheets. Now, I'm just holding one here at random for a period that has no relevant significance in our case; but you will notice that the out-of-work sheets have dates on them; 8/14/67.

Now, almost always these out-of-work sheets are made on Monday mornings, after dispatches for Monday morning have occurred, off of the preceding week's sheet. In other words, after they have made the dispatches off of the sheet for the 7th of August, whoever's left in the hall then comes back and signs this list, moving up in position according to the number of people who had been dispatched during the previous week. I'm going to do this slowly and a couple of times, because it is important that you understand the process here that's involved.

So, for example, on -- well, say on the afternoon of the 15th, or any time during the week that a given sheet would be in effect, the carpenters local gets a call for five forms men, or carpenters, tomorrow, sent out to such and such a contractor. Now, under the rules of the union, the business agent then goes down the list and takes the first man, if the first man is there and available, and wants the work. Which means the first five people who should be dispatched would be the top five names on the

[RT 151]\*

list. Well, there are \* certain exceptions to that. It's difficult to understand quite what it is, but sometimes if a person doesn't have any box checked, they just would go on to the first person who's got a box checked; but that's an ancillary matter that we will get into at a later

point.

But, at any rate, the regulations are, the rule is, the union bylaws are, that they must be dispatched in order if they are qualified to do the type of work that is being requested. Sometimes you get a call for a cabinetmaker. Well, not all the carpenters are cabinetmakers. That's a rather refined element of the field, and consequently, they may have to go several pages before they find a cabinetmaker. But, in general, for the general type of work that these men do, they are required to come off of this list.

Now, when the carpenters local gets this original call from the employer-contractor, they have what is called the white slip. I don't know offhand if we have a copy of a white slip here, but basically a white slip -- I think what I'll do, as a matter of fact, is jot down for you the various forms that are involved.

First, we have the out-of-work sheets -- my apologies for anybody that gets shivers from that kind of squeaking. Okay, the out-of-work sheets are the sheets I have shown you. That's the long form.

By the way, as an addendum to the out-of-work sheets, that is, each man that is out of work after a Monday morning's dispatches signs the following week's sheets. That means,



for example, during the week three people off

[RT 152]\*

of this \* week were dispatched. They obviously will not be on the sheet the following week, so that means, in a sense, that everybody has moved up three spaces; or if 40 people have been dispatched, then they would have moved up 40 spaces -- if they were ahead of you, that is.

Okay. Each man is supposed to sign his own name, and each man is supposed to sign in the order of the preceding week. The evidence will show that on numerous occasions these business agents, some of the defendants, would allow friends of theirs to sneak in. That's the word. It's called a sneak-in. In other words, you'll find men signed here who have no business being signed high on the list, who should, rather, be at the back of the list, but who you will find are relatively high on pages 1, 2, 3, 4; high on the list.

You can see by the one document that I'm holding, that some names have been lined out. This means they were dispatched that week, consequently, they will not be on the next week's list, unless there is an exception; unless he has less than two days' work. In other words, if a man that goes out on a job that lasts less than 18 hours -- 16 hours, I guess it is -- if it lasts less than that, then he doesn't lose his place on the list; but other than that, he loses -- if he goes out for a three-day job, he loses his place

on the list. At the end of the three days he has to come back and sign on the bottom of the list. If he gets a year-and-a-half job, works a year and a half, he comes and signs at the bottom of the list.

[RT 153]

The evidence will disclose to you that numerous jobs last months and months, sometimes a year, sometimes even two years on some of these bigger jobs. The evidence will disclose to you, in that respect, there are good jobs and there are bad jobs. All right. Now, that's the nature of the out-of-work list.

Now, as I indicated, when the business agent, or when the office of the carpenters get this telephone call -- now, this phone call could be taken by a business agent if he happens to be in the office in the afternoon or morning, when that call comes in, or it could be taken by one of the clerks in the office. You will see the name Evelyn Folick, on a few occasions, and she was a clerk that worked for the union; and you would see that on some of these white slips. These are telephone orders; telephone orders for men.

A white slip is made out. Get on the telephone, yes, okay, Mr. Superintendent, or Mr. Foreman, or whoever she's talking to from the construction company, you want five carpenters for tomorrow. All right, where shall they go? Okay. And she makes a notation of that.

Now, that white slip is given to the business agent in the morning so he knows what jobs he has to fill. Now, he takes this white slip and he says, "Okay. The Simpson Construction Company wants five men" -- five forms men, we'll say. He goes down, "Okay, Mr. So-and-So, Mr. So-and-So, Mr. So-and-So." If those men are there, they will be dispatched on this sheet, if it's done properly.

There's another document that will \*

[RT 154]

come into play \* in this case, and this is an orange card, and this is the employer request. Now, the employer request form is a document that is a little card about 3-by-6, something like that. It's orange, and that's the official form which a contractor, the employer, uses when he wants to request a particular carpenter. So the rules do not say that all dispatches must come off of this sheet. There is an exception, and that is, the employer may request up to 25 percent of the labor force that is being dispatched to that job.

Now, of that 25 percent, the rule also says that before you can make such a request, the man that you are requesting must have worked for you some time in the last, I think it is, three or five years. In other words, they can't just go out and request anybody, but it's got to be somebody who has worked for that construction company in

the past, and then their requests are technically limited to 25 percent of the force they are hiring.

Now, the orange card has not been uniformly required of an employer. The union has allowed them to send in any type of a slip, just a written request for carpenter Joe Smith. Please send Joe Smith out to my job tomorrow, or the next day, or whatever day they are having dispatches sent out. So the employer can use any written request; just a little slip of paper, a scrap will be enough. In one case, I think the request was made on a block of wood. So, in other words, the formality of the request system is not formal, to put it in a nutshell.

Now, in addition to these two methods

[RT 155]

of written \* requests, there are also oral requests. Now, the oral requests generally would come at the time the original telephone call was made, maybe to the clerk, Miss Folick, who I have mentioned, or even to the business agent himself, "Tomorrow send us out five carpenters. Make one of those Joe Smith" -- or make two of them, Joe Smith and Ben Smith, that sort of thing. So the person who took the telephone order would make a notation on the white slip, since this was a telephone order, make a notation on there, we also have a request for two people, or whatever it may be.



All of these procedures of requests, all three, have been honored throughout the period that our lawsuit is concerned with, which I might point out to you is roughly from January 1, 1967 to April 1, 1969. The evidence will show that all these forms of requests have been made, and have been honored.

Now, one other card, or slip of significance, is called the work referral. The work referral slip is -- I'll take the first one here, so I can put it back in order and know where it goes. I have no idea what it is, but here's a work referral slip. It is the pink slip. This slip is given to the carpenter at the time he is dispatched by his union. In other words, the business agent said -- I can't quite read the name here, but let's say it is Joe Smith, to stick with my highly imaginative name -- "Mr. Smith, you're being dispatched over to the William Simpson job at Sunset and Vermont." The slip has got the name and signature of the business agent who's making

[RT 156]\*

the dispatch, and if the dispatch \* is a request, sometimes the word "R-e-q" will appear on this slip.

So the worker takes the slip handed to him by the union, and he goes on to the job, and this shows that he's been properly dispatched to the job. So that's the work referral slip.

The allegations of this lawsuit are, and the evidence will support it, that in the dispatching procedure Mr. Hill would be personally discriminated against in numerous ways. For example, the evidence will show that Mr. Hill would be on the out-of-work list, and he would be in a position where he should be sent out on a job, but the business agent in charge, rather than sending out Mr. Hill, who is ready, will, and able to work, would do one of several things. One thing he might do is he would take a friend of his, who may or may not be on the sheets, and take that work referral slip and just write the word "Request" on it, even though there had been no bona fide request, and they would give that job that Mr. Hill should have been dispatched to, to a friend.

Now, every time they would do that, obviously, Mr. Hill did not move up a notch, if somebody ahead of him should have gotten that job, and on some occasions you will find that people below him got those jobs who were on the list below him, and other times people who were not even on the list got these jobs.

Now, if there is a request, as the work referral slip might indicate, then we go back

[RT 157]\*

to the orange cards. \* Any written request at all, or proof of any oral requests, if it is noted on the white slip, and we check to see if there was a



request. Well, a fair number of our records are unavoidably missing, but that which we have will demonstrate to you for certain periods of time that there would be no evidence on numerous occasions -- no evidence at all -- that there was such a request.

Mr. Hill was discriminated against in other matters. For example, the business agents, whose responsibility it is to see that these lists were signed in the proper order, and who is the only person charged with that responsibility, would let sneak-ins, people sign above Mr. Hill's position; and you will see that on some of those occasions, those people got dispatched to jobs where, but for their presence, the job should have been offered to Mr. Hill.

You will find other areas of discrimination against Mr. Hill. The testimony will be that it is the policy of the business agents to tell a man when he's next on that list, "You're next. We've got these jobs available. We've got a job for, we will say, the Simpson job. It looks like it's going to last six months, or one month, five days. We've got this job that's going to last a certain amount of time." Obviously, it is done, because when you're on the list, and you're up high, preference is to the longer jobs so you can keep working and keep out of the employment lines. The evidence will show Mr. Hill was never given his choice of better jobs, and that oftentimes he would sit on those lists for, like, three months, going from

[RT 158]\*

the bottom of the list to \* the top of the list, and when he'd get to the top of the list, they would offer him a three - or four-day job, or a very short job, when other jobs were available. So he'd go out and work three days, and spend another lengthy period of time on the out-of-work lists.

The evidence will show that the friends of the business agents worked regularly and constantly, and almost without ever being on these out-of-work lists.

The evidence will show that numerous people in the union -- and we're not bringing all of these people in for you to examine. It would take forever to finish this case, but we are bringing in plenty -- you will see that numerous of the political cronies of the dispatchers, the people who were in control of the dispatching procedures, that they worked hundreds and hundreds and hundreds of hours, whereas Mr. Hill, in 1967, worked no hours; but that was part of the period of time, in fact, the most period of time he was disabled from the emotional breakdown he had because of conduct which occurred earlier in the year, which I will talk about in a moment.

But in 1968, when he was available the entire year, Mr. Hill worked something like 600 and some hours for the whole year, and the cronies of the "in" group worked, I don't know, three, four, five, six times that much. I'm not sure, but far out of proportion.

In early 1967 -- well, let me -- yes, in early 1967 Mr. Hill was the elected vice president of Local 25. He had been elected in 1965, I

[RT 159]\*

believe, or '66 -- '66, I think -- \* and I think it's a three-year term that would expire around June of 1968.

The evidence will also show that Mr. Hill has been elected official of that union in various capacities; that he has been on the trial board; he's been on the negotiating committee; he's served in various offices as trustee, steward, that sort of thing -- stewards are appointed. We'll talk about that -- various types of offices that he held. In other words, he's been a very active political person.

Just about the first of 1967 certain incidents were taking place in the union. One incident was an annual report, that all labor unions are required to file, had been filed under the signature of the president of the union, a man by the name of John Nelson. Mr. Nelson had signed this report, and apparently the federal government, for one reason or another, had sent it back and said it had to be revised. There were some discrepancies of some sort. Mr. Hill and Mr. Nelson, president and vice president, were asked to resign the new -- or first, Mr. Nelson was asked to resign the new one, the new revised document, and Mr. Nelson wanted a hearing with an auditor. He asked Mr. Hill to join him. They tried to set up a meeting

with Mr. Keen, who was -- I think his office is called like the treasurer. He's in that office all the time. He's one of the defendants -- and they asked to set up a meeting with the auditor, they didn't want to sign something they didn't know

[RT 160]\*

about, and put their signatures to it.\*

Mr. Nelson refused to sign it. It was presented Mr. Hill to sign it. He also declined, said he wanted to find out what the discrepancy was, and wanted to have a meeting with the auditor.

They had a meeting arranged at that time, but the auditor didn't show, and they still attempted to have Mr. Hill sign this document. He said, no, he wouldn't. That's one incident that was going on.

At this time a general eruption of a political nature occurred over this incident. Mr. Hill had refused to sign the document, and in early January, the January the 1st books, he was on the out-of-work sheets. Hostilities which had been smoldering came to a head, primarily between him and a man by the name of Blackie Daley; E. G. Daley, one of the more significant defendants in this case. Blackie Daley was the business agent with the most seniority as business agent, and although I don't think there's an official title, he was, for all purposes, the chief business agent. He was the man who basically was in charge of Local 25. He ran Local 25, and the evidence will



show that he ran it with a steel clamp, and I mean his fist.

The evidence will show that he often said, "Nobody gets a job out of here unless I okay it," and he told it to Mr. Hill on numerous occasions during this period when he and Mr. Hill broke. Mr. Hill had been friendly with him prior to this, had supported him, I believe, for an election once before; but at this stage they broke over the

[RT 161]\*

internal affairs of the union. \*

Mr. Hill was threatened by Mr. Daley during this period, "You will sit on this bench" -- that is, the out-of-work bench -- "until hell freezes over. You'll never work here again," things of this nature. Constant threats to Mr. Hill, and various incidents occurred to bear that out.

Now, during this period Mr. Hill started keeping track of the dispatch system. He started actually going through, trying to check the names of the people who were on the sheets, to the dispatches that were actually sent out, and he saw that there were numerous, numerous -- 50 percent, give or take a little -- discrepancies. Men being dispatched who were not on these lists, and every illegal dispatch, certainly an act of discrimination against him, as well as anybody who was under him, or who should have been dispatched on that list.

So he started keeping this list, and he started complaining, charging these men who were in charge -- Mr. Daley, primarily, but there was also at the time Mr. Wilk, Joseph Wilk -- charging these people with failure to follow the rules, failure to carry out their trust, failure to dispatch their jobs according to the rules, regulations, and constitution of the union.

These men, in turn, told Richard Hill, "Get lost. If you don't like it, get the hell out of this union. We'll run it our way. Split, leave, go," called him stupid names, made fun of him, picked on him at every opportunity, demeaned him socially, told other workers, "You mess around with Hill, you'll get the same treatment

[RT 162] \*

he's getting." A constant \* accumulation of this type of activity.

In March, 1967, Mr. Hill had been offered a job which was called a steel-forms, or steel-pan type of job. It's not a typical wood forms, these are steel forms. The evidence will show you that a man has to have special strength, be particularly strong to handle that type of work; that he has to be -- that this is absolutely the bottom of the barrel to most carpenters, most trained journeymen wood carpenters. That is the bottom of the barrel for the type of work, and if you're not trained in it, you can get injured. It's not just something you give to somebody who does not have training.



But, at any rate, they offered Mr. Hill this job when his name got to the top of the list in March of 1967. This is after sitting on the bottom of the list, and moving up from January. Mr. Hill declined the job, said he was not trained for it. This job was a penalty type of job. They knew what they were doing. The evidence will show that they knew what steel-forms jobs were. This wasn't just an ordinary dispatch, in the ordinary course of things. As a matter of fact, the evidence will show that certain men, the stronger younger men, were particularly suited for this, and were primarily used in the steel-forms work, as compared to the general average carpenter.

So Mr. Hill declined this job. When Mr. Hill declined it, Blackie Daley telephoned the Department of Employment, and they said, "Richard T. Hill is not eligible for your benefits

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for unemployment benefits" -- which most \* carpenters lived off of when they were sitting on these lists moving up -- "He's not eligible for this, because he refused a job." Mind you, this is his union calling the Department of Unemployment and telling them this, not an employer.

The evidence will also show that the employer has a duty to report it; report firings, quitings, refusals of work, to the Department of Employment. There's no such obligation on the union to do this.

So Mr. Hill, when he went to the Department of Employment for his next check a few days later, they pull out a pink slip and advise him that, "Sorry, you apparently turned down work." So at that point Mr. Hill said, "Well, just a minute. Please call the union." The girl calls the union, talked to Mr. Wilk, I think it was, and got some information. The upshot of that was that he did not get his check. They said, "Well, we'd have to have a special hearing on it, because we have this notation that you have turned down work. After sitting on the unemployment lists for three months, you have turned down work, and we can't give you the benefits until we have a special hearing on this."

Well, this was more or less the climax of an extremely hectic four months in Mr. Hill's life, and at this point, shortly thereafter, shortly after this incident, in the early days of April of 1967, Mr. Hill just collapsed, and his doctor placed him in the hospital for a period of nine or ten days. And the doctor, Dr. Vincent DeJohn, will come into court, and he will testify to you that they ran every conceivable test on Mr. Hill,

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and they could find nothing \* organically wrong with him; that is, no physical answer to the cause of this breakdown. It wasn't an ulcer, it wasn't an old ulcer coming to life again, no evidence of that, although there is some indication he had had an ulcer 20 years prior. It was because of something they couldn't find physically.

The records do say that, among other things, Mr. Hill was a moderate drinker. There's one notation that he drank heavily. I don't know anybody that knows how or why that notation got into the record, but his own doctors say he was a moderate drinker, which he was. There's no secret about that.

But Dr. DeJohn will testify that during this period of time he had advised Mr. Hill to "Just get away from your problem at this union for a while. You can't take this day-in-and-day-out type of harassment, abuse, criticism, with the pressures you are going through." So Mr. Hill got out of the hospital the middle part of April, and after he did, he stayed on disability until approximately the first of May, 1967.

Then in May 1967 Mr. Hill had implored Dr. DeJohn to let him go back to work for a while. He wanted to try it. He needed the money. He'd been using up savings that he had, meager that they were, cashing certain government bonds that he had bought in the past.

Mr. Hill, by the way, is a single man, is not married, does not have a family.

So Dr. DeJohn said, "All right, we'll

[RT 165] \*

try it." \* So he released Mr. Hill for work around the end of April of 1967, and Mr. Hill

then went to a job that was entitled the Dinwiddie-Simpson job. This was a job to build a big building for two contractors, Dinwiddie Construction Company, and Simpson Construction Company, a joint venture, as one, to build this big building.

Mr. Hill went over to that job, and attempted to get a request for him so that he could get an employer request so that he could go out and he could go back to work.

I might add that it was the custom of a union to put a man to work as quickly as possible when he'd come back from a disability or an illness, an injury, that sort of thing. Mr. Hill was not given that formal accord.

So, at any rate, he attempted to get a job request, and for the workday of May 1, 1967, a gentleman by the name of Charles Simpson, who was a superintendent on this Dinwiddie-Simpson job, had, through one of his people, made a request for something, I think it was five carpenters, and I think he named all five, or at least some of the five, on that list was Richard T. Hill. This was an oral request.

Mr. Hill was at the dispatch window on the morning of May 1st, and at the end of the morning call his name had not been called for the Dinwiddie-Simpson job, and he inquired of Mr. Daley, "Don't you have a request for me from the Dinwiddie-Simpson job?" Mr. Daley said, "Well, I'm not going to tell you. It's none of your business."



I'm running this place. If I did have one, you

[166]\*

wouldn't get it, anyway"; words \* along those lines. Mr. Hill was not dispatched to that job, even though there had been a bona fide employer's request.

Now, there had been, possibly, at least, some evidence saying, well, it wasn't a bona fide request, because it was oral. The evidence will show there were plenty of oral requests made. There will be evidence to the effect that the Dinwiddie-Simpson was a one-time job. Nobody had ever worked on it before.

Mr. Hill subsequently filed a National Labor Relations Board action, saying they failed to dispatch him on that job pursuant to the request, and Mr. Hill carried that matter into the National Labor Relations Board. At the time of that National Labor Relations Board pending action, Mr. Hill was constantly being berated -- I might add, that after about the first of June Mr. Hill went back on disability. He didn't get the job at Simpson, and he was low on the list, and they weren't sending him out to work, and he felt it was customary for a returning man to get some type of a job, so Mr. Hill, going through this on his doctor's orders, was placed again back on disability, where he remained for the rest of the year.

But Mr. Hill continued to carry out certain of the functions of his office. He was, as I told you, vice president of the organization, and he had to -- he couldn't miss three meetings in a row, or you'd be terminated from office; so he fulfilled his obligations in that manner, and did continue to have some contact with the union.

[167]\*

And the union officials would say to the union \* people, with reference to Hill, "Who does he think he is to come and try to take money from the union from the NLRB," and demeaned him further, poked fun at him, just made his life very, very difficult.

At the time of the NLRB hearing, Mr. Daley even threatened Mr. William Fleming, who was there to testify as to certain things that would help support Mr. Hill's case. Mr. Daley met Mr. Fleming in an elevator, and told him that he'd better not testify against the union in favor of Mr. Hill, otherwise he would get some of the same treatment that Hill was getting; but Fleming, fortunately, is an elderly Swede, I think, who is not easily intimidated, as you will see, and he went in to testify to those things he could at the NLRB hearing.

For the balance of 1967 Mr. Hill did not work, because he stayed on disability, just unable to, physically unable to, emotionally unable to, mentally unable to work.



He was released in January, on January 1st, I think it was, of 1968, to go back to work. So on January 1st of 1968 he came back to work, and again asked for the courtesy that had been given to others, to allow him to sign high on the list, or be given a dispatch so he could get back earning some money. He had asked this of Mr. Daley, or Mr. Fenwick, who was in the picture around this time -- Fenwick or Wilk or Daley, one of the three -- and on the first day back he was not dispatched, so he went over to the Los Angeles District Council of Carpenters to Mr. Gordon McCulloch, and he asked Mr. McCulloch -- who, by the way, has the responsibility of all the business agents. They work directly under him. They are his responsibility. Mr. McCulloch, I believe, was instrumental in getting Mr. Hill a job with the Vinnell Company, and Mr. Hill worked on that job a period of about three weeks, and then was terminated. We cannot establish how or why he was terminated, but it was shortly after one or more of the business agents had come on to the job.

The evidence will show that those men who stayed on that job, the rest of them, they worked the entire year on that job, made something like eleven to fifteen thousand dollars on that job. Mr. Hill worked on that job a handful of hours.

So then Mr. Hill went to the bottom of the list again, and he worked his way up, and there are other incidents -- numerous other incidents which I won't go into now, but all through 1968 --

incident after incident of discrimination against him, threats against him, threats of fighting him, "I'll beat the hell out of you," threats of pushing him -- nobody ever hit him, but pushing and shoving, coupled with threats, constantly telling other people, "You mess around with Hill -- don't let me see you with Hill, or you're going to get the same treatment he's getting" -- constantly, all through 1968, through April of 1969 when this lawsuit was filed.

During that period of time, 1968 and 1969, Hill didn't go back to his doctor except on one or two occasions, but during that period of time the

[RT 169] \*

evidence will show that \* he continued to suffer severe emotional distress, that this had a horrible effect on him, causing him physical upset, emotional upset of a most severe nature.

The evidence will show that all of this conduct was intentional; that these people did this conduct against Mr. Hill because of the political opposition inside of this union, where he was fighting what he considered to be their corruption. They knew he was fighting it, and he fought it up until at least this lawsuit was filed.

There will be testimony from several people who were witness to some of the events. Some of the events will go without corroboration. We have subpoenaed into court people who are both -- who were at one time or another politically

supporting Mr. Hill in his opposition to the internal union politics, and people who were opposed to him. They are not coming -- being subpoenaed into court to testify on his behalf, as you can well imagine, but we will have other testimony to bear out some of the allegations of our complaint.

So, in a nutshell, that is the nature of our lawsuit. Specific details for 1968 we will bring out as we go forward, but it is important that you understand the hiring hall mechanism -- and we'll go through that with testimony early in this trial, to bring it out even further -- but it is important that you fully understand that so you can comprehend the nature of the conduct that followed.

Now, as I said at the beginning, the testimony doesn't always follow exactly as you

[RT 170] \*

think it's going to. This is what I think is going to occur, based on depositions taken in this case -- we have taken about 12 depositions -- on interrogatories -- those are written questions we have asked of defendants in the case -- and consequently, if things follow their normal course, this should be our testimony in court.

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[RT 216]

MR. GEFFNER: Well, your Honor, at this time I'd like to make a motion for a judgment in favor of all defendants, following the opening

statement of the plaintiff.

I waited until I finished my opening statement so there would be continuity, but I believe before evidence is introduced, a motion is proper, based on the plaintiff's opening statement as to what he intends to prove.

I know we have gone into this point of pre-emption in great detail on the motion on the pleadings, and I'm not going to take a lot of time in argument, but I do feel the obligation to make that motion at this time.

When your Honor had the motion for judgment on the pleadings, he simply had before him the allegations of the second cause of action of the first amended complaint, and at that time a motion for judgment on the pleadings, based on pre-emption, was that the items complained of in terms of job discrimination, dispatching procedures of the union that's involved in interstate commerce, is arguably an unfair labor practice

[RT 217]\*

under the National Labor Relations \* Act of 1947, as amended, and therefore, is within the exclusive jurisdiction of the National Labor Relations Board and the federal courts in enforcing and acting on Labor Board orders, and that under the pre-emption doctrine the state courts are precluded from exercising jurisdiction by way of injunctive or damage relief.



Now, your Honor denied the motion, and we we proceeded with the selection of the jury, and Mr. Hobart made an opening statement. Now, in his opening statement Mr. Hobart went into detail, at length, to state that he intends to prove a discriminatory practice and procedures of the hiring hall of Carpenters Union, Local 25, and he would have all of the out-of-work lists, the request slips, the referral slips, to show a pattern of discrimination in this case on the part of Local 25 in relationship to Mr. Hill, and I think at one point he said that is the heart, or the crux, or the thrust, of their entire case.

Now, in view of that fact, your Honor does have before him, at least, what the plaintiff intends to prove, and does not have just the bare naked pleadings of the second cause of action that he was in a position of ruling on for motion for judgment on the pleadings.

Now, again, at this time I want to renew my motion, make my motion based on pre-emption. I have just one short argument, and I'm not going to take a lot of time.

Under the Garmon case, under the Borden and Perko cases of the United States Supreme Court, upheld and reaffirmed by the United States

[RT 218]\*

Supreme Court in Lockridge, and \* on the California state court cases, which are numerous, but specifically the case of the Teamsters v.

Superior Court arising in Orange County, that the issue of hiring hall procedures, dispatching procedures, and discriminatory policies is clearly preempted under the pre-emption doctrine and the state courts do not have jurisdiction.

Now, this case, I believe, presents a classical case for the basis of the pre-emption doctrine. Whether we agree or disagree with the pre-emption doctrine, it's certainly the law of the land, and the pre-emption doctrine in the Borden and Perko Cases, and our own cases in California, state that there is a national federal policy involving labor relations in interstate commerce, which a National Labor Relations Board has the expert administrative body, is given exclusive jurisdiction to determine discriminatory practices in the hiring hall of unions that are involved in interstate commerce, particularly the nature of the construction industry which is well into the gamut of interstate commerce, and is one of the most important industries in our economy that Congress was concerned about in terms of interstate commerce and national labor law policy.

Now, the sole remedy is with the National Labor Relations Board. Now, if the Labor Board had the opportunity -- and in one instance Mr. Hobart's argument stated Mr. Hill did file a charge with the national Board involving the Dinwiddie-Simpson job -- then the Labor Board decides whether there is unfair labor practices



through their procedures, and either issues an order of some kind, or not.

[RT 219]

Now, the problems of running a dispatching procedure for a union is a complex, difficult area of understanding and comprehension. Cases are clear that the area of Labor Relations is unique in our law, and that's why selective bargaining agreements are not treated as standard-type agreements, in the sense of being a commercial agreement. Something different, the Supreme Court has said, because of the uniqueness of labor agreements.

Now, that's where pre-emption applies. It's only an expert administrative body on a national level that can really understand, or should understand, the complexity of labor relations and the interplay between employers and unions and members involving hiring procedures, and therefore, the National Labor Relations Board is the sole body forum to make a judgment regarding discriminatory practices, and to issue relief, if necessary.

Now, again, the reason why I say this is a classical case is because the plaintiff is asking a jury, and your Honor, to some extent, as part of the state court processes, to sit here for six weeks, 30 trial days, and go through out-of-work lists, request slips, dispatch procedures, pass judgment on hiring practices of the local union in the construction industry that occurred a

number of years ago, and it's exactly that type of function that this court -- with all due respect to your Honor and superior court judges, because the same applies to federal district judges, superior court judges, district court judges -- and jurors are not in the position to properly

[RT 220] \*

evaluate hiring hall procedures of a \* construction union in interstate commerce on a local level.

That has a national labor policy implication, and if this jury or your Honor grants damages to Mr. Hill, where the Labor Board may or may not have given relief -- and what that means is in spite of the expertise required in operating a hiring hall, whether it's unfair practice or not, on a national policy to an expert agency that is supposedly charged with understanding the complexity of labor relations, any jury, any state court judge, can hit a union with damages, with the obvious implications of what means to a national uniform policy.

I believe, your Honor, that this is the heart of Mr. Hobart's case, the plaintiff's case. We are going to have to sit here for weeks and weeks, and do the job that only the Labor Board, by direction of Congress, is charged with the responsibility to do, and we are not in a position -- your Honor is not, and the jury is not in a position, in terms of the complexity of labor relations, in terms of trying to take over

the job of the Labor Board -- to decide whether this hiring procedure was discriminatory or not.

MR. HOBART: Well, Judge, I don't think the issue at all is whether this hiring procedure is discriminatory or not. I think the issue is, did these individuals intentionally set out to discriminate against Richard Hill, and did they discriminate against him in a manner so as to cause the damages we have alleged.

The discrimination -- I should say the infliction of emotional distress does not come

[RT 221] \*

solely from the dispatch procedure. These people did treat him unfairly in the dispatch procedure, and that's part of it; but in addition to that, they also threatened him with starvation. They threatened to deprive him of his livelihood; in a sense, depriving a man of his own manhood. They told him if he didn't like the way things were being run, to leave this union.

He was an elected officer for most of the period that we are concerned with, in one role or another; had a responsibility, perhaps, to ask questions, but all he ever got was personal abuse. He got threats of bodily harm. He was pushed and shoved, in connection with the threats.

The people, as a part of a conspiracy and intention to literally smash --

THE COURT: Well, that is the distinguishing feature, of course, of your case. I mean, in considering whether I'm going to overrule or grant the motion on the pleadings pertains here.

But I think that you might well, in presenting your case, put your emphasis on that, and not on the minutia of the hiring hall procedure.

MR. HOBART: That is my intention, your Honor. I recognize that we could be here forever if that's what I was trying to do, but, you see, I'm not trying to indict the unions in their -- or this union in its dispatch procedure in a general way. That's water under the bridge, perhaps. I don't know whether it's going on now or not.

But what I have attempted to do, in the limitation of my presentation of evidence, is to

[RT 222]\*

show how these people \* zeroed in on Dick Hill.

THE COURT: Well, you stick to that purpose, and I'll deny the motion at this time.

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[RT 223]

KENNETH LE ROY SCOTT,

called as a witness by the plaintiff under the provisions of section 776 of the Evidence Code, having been sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HOBART:

Q. Mr. Scott, will you tell us your present job title and occupation, and who your employer is.

A. Business representative for Carpenters Union, Local 25.

Q. And when did you first obtain that position?

A. Took office in the latter part of July 1968.

Q. And prior to July of 1968 had you also been a carpenter working out of Local 25?

A. Yes, I was.

Q. Now, prior to coming into court, you had received from me a document, a demand to produce certain official documents; is that correct?

A. Yes, I did.

Q. Now, with respect to the documents, one of them that you were requested to bring, were all of the out-of-work lists, also referred to as the employment lists, from December 25, 1966 through and including April 1, 1969.

Can you tell us, Mr. Scott, which of

[RT 224] \*

those documents \* you did bring?

A. To the best of my knowledge, I think I brought most of the documents that you have asked for.

We've got an office staff working round the clock, double shift, trying to provide everything you want.

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[RT 230]

Q. Now, with respect to the work referral documents that you brought pursuant to the demand to produce, again, the demand to produce requested all work referral lists concerning work lists from various employers from January 1, 1967, through and including April 1, 1969.

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[RT 235]

Now, you say the office is continuing to search out these records?

A. Yes.

Q. Can you give us an estimate as to when that search reasonably can be expected to be concluded?

A. Well, they have been working now for two weeks. We are working two shifts. We have uncovered just about everything we possibly can.



Q. Have you brought everything that has been uncovered to court yet?

[RT 236] \*

A. No. When I left this morning they said they had \* a few more boxes. Also, they are accumulating this material because we may need it if a member comes in, so it's quite costly and time-consuming.

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[RT 245]

Q. Tell us when the union gets a job call how the dispatch is carried out; the physical surroundings, just in general.

A. We have dispatching between 7:30 and 9 o'clock in the morning. Now, a contractor will call at any time from approximately 7 o'clock in the morning until 9 o'clock at night, if you're in the office that long, and they will place an order for X amount of men, you know, for the following day.

If he called before 9 o'clock in the morning, then we just dispatch them. We call them out of the meeting hall, or the waiting room where the members, you know, sit and wait, and talk and visit, until such time you call out the jobs.

Q. So if you get a call sometime after 9 o'clock, that would be for the next day, would it?

A. As a rule. Normally speaking, unless it was an extreme emergency; or in some cases, you know, you might have a job that maybe the foreman was to call it in, and he didn't, and the last minute the superintendent calls in and says where are his men.

[RT 246]\*

Q. With those exceptions in mind, then, any call \* that would come in after 9 o'clock would usually go to the next day?

A. Yes, go to the next day.

Q. And conversely, any call that would come in before 9:00 a.m. would, as a general rule, reflect dispatches that day?

A. Dispatches that particular day.

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[RT 252]

Q. Now, Mr. Scott, after you are handed the telephone order and you know, for example, that particular employer wants five carpenters, what is it that you do in order to get those five carpenters?

A. Well, we have a P.A. system, and you call out to the carpenters that's in the hall there.

Q. How do you know which carpenters to call off?

A. Well, it's sort of difficult. You know, we started one system at one time, or they had a system which didn't work too well, where we had the carpenters classify themselves, and then the carpenter, if he had forms experience, he had to go down here and find a carpenter that would do forms, so he'd call his name.

Q. When was that procedure in effect?

A. That was in effect '68, '69.

Q. Also in '67?

A. I'm sure it was, yes -- I think -- in fact, I think that's the standard procedure, dispatch procedure. I think it's from the beginning of time.

Q. To back up for one moment, then, this document, the out-of-work sheet, is a document that the carpenter himself signs; is that correct?

[RT 253]

A. Yes.

Q. And there are various boxes where he can check the type of work that he feels that he's qualified to do; is that the idea?

A. That's correct.

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[RT 290]

Q. BY MR. HOBART: Mr. Scott, the rules regarding the dispatch of stewards is found where?

A. The rule for dispatching stewards?

Q. Yes. Do you know what document that is located in?

A. I don't know there is any set rule.

The business agent picks his stewards on the job. They choose the steward for that particular jobsite.

Q. Now, you have told us -- I may be confusing your statements with the opening statement -- the steward, basically, is the man who is the representative of the workmen on a job at a particular jobsite; is that basically his role?

A. Yes, that's right.

Q. And is it his function and responsibility to see to it that the Master Labor Agreement between the employer and the union is carried out?

A. Yes, to the best of his ability.

Q. It's his duty to see to it that any violations of the contract are corrected, or at

[RT 291] \*

least brought to the \* attention of the contractor?

A. Yes.

Q. And if they are not corrected forthwith, then it's his responsibility to bring that to the attention of the union leadership, in order that they may consider some future action?

A. Yes.

Q. And is it also his responsibility to assist in grievances that may occur on the jobsite; that is, complaints that the workmen have for some reason or other -- try to work out these grievances, any particular problem the men may have?

A. Yes.

Q. And in some situations, on those jobs where there are particular labor-management difficulties, he, in a sense, is a troubleshooter, and will go in and attempt to smooth the waters, or to assist management and labor in solving the particular disputes so the job can go forward?

A. Right.

Q. Would you describe that job as one of minor responsibility, or anything more than that?

A. Well, it's hard to -- there again, it's hard to explain this type of a job. For some --

Q. Well, in a general way, can you tell me, do you consider the responsibility of a steward to be one of minor responsibility, or do you consider it to be one of significant responsibility?

A. Well, it's of significant importance,

[RT 292] \*

but I don't \* think it's of a -- depends on the job-site. It's a relatively easy job for some contractors, and it's a rather difficult job for some contractors; but generally speaking, it's a relatively smooth operating job, yes.

Q. In other situations it can be one of immense responsibility?

A. Yes.

Q. I neglected to state, also, the steward is in charge of safety on the job; to see to it that dangerous conditions are eliminated, or reduced to the absolute minimum, consistent with state law --

A. Yes.

Q. Is that correct?

You will have to answer out loud.

A. Yes, that's correct.

In fact, this is the major role that he plays on the jobsite, is taking care of -- as far as his



work duties, normally speaking, they work on a -- you know, on the safety crews.

Q. And you have indicated that it is the business agent's responsibility to select and appoint the steward on the particular job; is that correct?

A. That's correct.

Q. Can you tell me, what are the qualities, or what are the criteria used by you in selecting a job steward?

A. Well, the way I try to pick a steward is to -- I try to pick someone that's capable of handling the grievances, and can handle it

[RT 293] \*

honestly, fairly, and resolve it; and if you can't, well, then, to bring it back to me to handle it.

Also, he should be a fairly competent man for that particular jobsite, for that type of work.

Q. You mean workwise?

A. Workwise, because according to our agreement, the steward is one of the workmen. Along with his work duties, then he has to carry out the functions of a steward, along with his work duties; normal work duties.

Q. Are there any other qualities, any other personal qualities that you look for in the man who you send out as the steward?

A. Well, there's different things you look for. It takes a variety of men. It takes different types of people, different types of jobs.

Q. Well, do you want an honest man?

A. Yes.

Q. Or is honesty one of the qualities you look for?

A. Oh, it's a must. Yes, definitely.

But that doesn't always mean you get an honest man. In fact, it's hard to get stewards. It's hard to get carpenters to take the responsibilities of a steward. Most people would rather shun away from it, rather than take the responsibility.

Q. It is, I gather, an additional responsibility --

A. Yes.

Q. -- on the workman?

A. Yes, to some extent it's time-

[RT 294] \*

consuming. It's \* very time-consuming.

Q. Does he get paid any extra for that responsibility?

A. No.

MR. GEFFNER: Is that answer "No"?

THE WITNESS: None. None whatsoever. I'm sorry.

Q. BY MR. HOBART: Does he have to have an ability to communicate with both management and labor?

A. Yes.

Q. In other words, if a dispute does occur, he's got to be the type of person who can talk with management and attempt to resolve the problem with the least amount of difficulty?

A. Yes.

Q. I guess level-headed would be a good word?

A. Yes, very good.

Q. Now, you indicate that in the dispatching of a man to a job as a steward you look for these qualities. Now, can you tell us if there are any other requirements besides finding a man who meets these qualities; any other requirements on you in selecting the job steward? By "you" I mean the business agent.

A. Well, this is a difficult question. I would say unless they skip something that's normally -- the reasons I give you in picking a steward is probably the main reasons. I'm sure there's some exceptions.

Q. Okay. But I'm referring to, is there any requirement that the man who is dispatched as a steward, that he must come off of the work lists, for example?

[RT 295]

A. No. No, there's no requirement for that.

Q. So he can be selected at random, according to the business agent who is charged with the responsibility of appointing the steward?

A. Right. In fact, many times you have to switch stewards from job to job because of personality problems, or could be the supervision's quality, or there's many reasons. You might ask two stewards to switch jobs, and it works out beautifully, where before it was unworkable.

PAGINATION ERROR

TEXT IN SEQUENCE

Q. Well, is it within the province of the business agent to send a man out on a job as a steward, even though that man may be, we will say, on the last page of seven or eight or ten pages of the unemployment lists?

Can he pick a man from down below there, and skip him over all the other men above him on that list by labeling him a steward, and sending him out on that job?

A. Sure, definitely, because most stewards are going to be working.

There's only 50 percent of our jobs that have stewards, anyway. You can't get stewards to take the jobs -- the duties of a steward, so, consequently, most jobs have no stewards; none whatsoever.

Q. Now, can you point to any written document that allows the business agent this right to dispatch anyone he wishes as a steward?

A. Well, I can't recall of any document, other than in our little Los Angeles bylaw system, that the business agents have the right to pick

[RT 296]\*

the steward. Other than that, \* I don't know if there's ever been -- I'm sure, to the best of my ability, that it's just the type of thing that's always been.



Q. When you say the Los Angeles bylaws, what bylaws are you referring to?

A. Los Angeles County District Council of Carpenters. If there's any document, I'm sure it would be in that.

Q. I have before me a copy of the Los Angeles County District Council of Carpenters and Joiners Trade Laws that I think was in effect during the entire period of 1967 through '69, and reading from page 32, section 43 says:

"The first member starting to work on a job or in a shop shall notify the Business Representative of the Local Union in the area within twenty-four hours; he shall then act as Steward until the arrival of the Business Representative, who may then appoint a Steward...."

Now, my question is this: Isn't it true that the business agent's responsibility in selecting a steward, under the rules of the Los Angeles District Council of Carpenters and under the Local 25 rules, is that he must select a carpenter who is on that job, and until he does, the first carpenter is considered the steward -- first carpenter on the job is considered the steward until the business representative comes out and selects someone else for that job, if a change is to be made?

A. Well, the first carpenter on that job

[RT 297] \*

naturally \* assumes the responsibilities -- or he's liable for the responsibilities, I should say. However, most carpenters won't assume those responsibilities, and they refuse to take the responsibilities of a steward. Consequently, each local union has their own type of steward's program.

I can't speak for the rest of the local unions. I can speak of 25's, because I think we have one of the best steward's programs in the country; but the steward's program goes back to the beginning of the brotherhood.

Q. Well, my question is, can you point to anything in writing which tells you that you can avoid, through the appointment of a steward, the carpenters' hiring hall procedures -- where is it in writing that gives the business agent the authority to take some man out of order, and title him steward, and let him jump over all the rest of the people ahead of him on the list, and send him out to work? Where is that authority set forth in writing?

A. Well, that I couldn't answer you. This is something that, like I say, it's always been that way, and this is the way I was instructed on picking them.

Q. Who instructed you in that way, Mr. Scott?

A. Something I have always know, as long as I have been in the brotherhood.

Q. You say you were instructed in that manner. Who was it that instructed you that you had this authority --

A. From my experience as a carpenter.

Q. My question is who?

A. I couldn't tell you who. Anywhere I

[RT 298] \*

ever worked, \* that's the way the local union that had jurisdiction --

Q. Back in the days of Blackie Daley, when he was a business agent and you were just a working carpenter, Mr. Daley kept a certain group of people working fairly regularly by labeling these people stewards, didn't he?

MR. GEFFNER: Your Honor, I object to that question.

Mr. Scott can't answer a question involving Mr. Daley, when Mr. Scott was not in office.

MR. HOBART: I can phrase the question unobjectively.

THE COURT: Well, I think you should first find out if he knows about Mr. Daley's practices.

MR. HOBART: Surely.

Q. Mr. Scott, did you ever work as a steward during 1967?

A. Yes, I did.

MR. GEFFNER: Mr. Scott, I can't hear you.

THE WITNESS: Yes, I did.

Q. BY MR. HOBART: Who appointed you as a steward in 1967?

A. I'm sure it was Ben Fenwick.

Q. Did Blackie Daley ever appoint you?

A. Yes, I think Blackie also appointed me as a steward.

Q. And how about Joe Wilk?

A. Yes.

Q. It probably wasn't Fenwick, was it? He didn't take office until sometime in 19- --no,

he was in 1967, too. I take that back.

[RT 299]

At any rate, all three of them on occasion appointed you as a steward on particular jobs; is that right?

A. Correct.

Q. And back during those days did Blackie Daley have what we would call the stewards' meetings, where you would meet in the evening and you would have dinner, and sit around, and you would discuss the responsibilities of stewards, and so forth?

A. Yes.

Q. And the people, by and large, who attended those meetings -- by the way, they signed a little document called "Stewards' Meeting"? They'd sign with their name, their address, and telephone number when they went to those meetings?

A. Yes.

Q. And you signed those lists when they had them, didn't you?

A. (No audible response.)

THE COURT: We can't get --

THE WITNESS: Yes.

Q. BY MR. HOBART: Now, do you have an opinion as to whether most of those men who attended those evening functions, these stewards' meetings, these dinners, whether these men, as a whole, were regularly -- that is, virtually constantly employed?

MR. GEFFNER: Your Honor, I object. Mr. Scott's opinion in this regard is not material.

THE COURT: Let's have the question read.

[RT 300]

(Question read.)

THE COURT: I will overrule the objection.

THE WITNESS: Yes, I would assume that they would be. Yes.

Q. BY MR. HOBART: Now, using yourself as an example, during those days were you dispatched as a steward by any of the business agents at that time, even though your name was not next in order on the lists?

I'm sorry, I didn't hear you.

A. Yes.



Q. All right. So when you say you learned that it was the practice of the local to dispatch people as stewards even though they were not high on the list, that is, next in order, I would assume that you learned this, then, from your predecessors in office, Mr. Daley, Mr. Wilk, Mr. Fenwick?

A. No.

Q. Did you learn any part of it from any of those three?

A. No. As long as I have been a carpenter, that's the way it's always been. Each local union had their stewards' programs, and then that local union sent their stewards out on the jobsite.

It takes a different type of carpenter to be a steward. As I said before, very few carpenters are willing to take the responsibility of being a steward.

Q. Do I understand you correctly, when you say that it's simply a policy that has long been in existence, as far as you know, and that

[301] \*

also, as far as you know, there's \* no written authority for the business agent to dispatch people out of order as stewards?

A. For as long as I've known, the brotherhood has insisted on a good stewards' program.

Now, the United Brotherhood -- not only the United Brotherhood of Carpenters, but I think all the unions of other organizations.

Q. My question is, are you saying that it's just been a practice, as far as you know?

A. As far as I know, yes.

Q. Okay. My next question is, can you direct me to any authority that contradicts the carpenters' hiring hall procedures, which tells you to take them off the list in order, with the minor exceptions that we have already discussed, because you decide to label them a steward?

A. No, other than there, again, you have to use common sense, because if you've got a job where you need a steward, you know, then you've got 10 men on that job that wouldn't want to be a steward, and consequently, you're going to have to come up with a steward somewhere, if it looks like you need one.

Q. You are talking about a job where there could be trouble, something out of the ordinary; is that right?

A. Well, no, not necessarily.

Q. Are you telling us --

A. Okay, it could be out of order, or if it's a large job, naturally, you need a good steward on that type of job.

[RT 302]

Q. Well, if you had a large job, and you are dispatching 25 men to a large job, are you stating that of those 25 carpenters who you send out, that it is necessary, as a rule, to pick somebody else lower on the list, or who hasn't even signed the list, and assign them out as a steward?

A. As -- because they are competent?

Q. Yes.

A. Oh, yes.

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Q. BY MR. HOBART: Under the agreement, Master Labor Agreement Between Southern California General Contractors and United Brotherhood of Carpenters and Joiners of America, that agreement sets forth the dispatch rules that are to be followed by the union, does it not?

A. Yes.

Q. And one of the articles indicates that the local unions shall establish and maintain open and non-discriminatory employment lists for the

[RT 303] \*

use of workmen \* desiring employment on the

work covered by this agreement, and the workmen shall be entitled to such use of these lists free of charge, and it also states further on that the following order of preference shall be granted.

It says that a person can be requested under the circumstances we have already discussed, and then it indicates that as the next order, "Workmen whose names are entered on said lists and who are available for employment."

Do you know of anything in the Master Labor Agreement that allows the business agent to employ people who are not next in order on those lists as stewards; send them out as stewards?

A. No, other than the exception of the stewards' system, which is, basically speaking, some of our working personnel of the organization.

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[RT 322]

Q. I'll be glad to rephrase it.

Is the purpose for allowing them to make the choice so that a carpenter who has worked his way to the top of the list can get the best job available at the time, if he wants it?

A. Yes, he has that choice.

Q. And a denial of that choice to him, then, would be in violation of the standard practice of the union, as you understand it to be?

A. Yes, but you remember, getting back to that dispatch procedure, there was a lot enters into this.

Now, if a carpenter has been dispatched to that job previously, and say, terminated, and the contractor calls again for X amount of carpenters for that same particular jobsite, then he might state that he doesn't want any of the carpenters that was dispatched there before; then, consequently, you couldn't dispatch them. So there's so many things involved.

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[RT 421]

#### REDIRECT EXAMINATION

Q. BY MR. HOBART: You indicated, if my notes are accurate, Mr. Scott, you said back in 1967 and '68 that carpenters of the local didn't have any clerk in there to watch the book during the day?

A. Correct.

Q. Do you recall the name of Evelyn Folick?

A. Yes, I do.

Q. What was his title?

A. She. At that time she was an assistant to the financial secretary's office.

Q. She was a clerk there in the union, wasn't she?

A. Yes, a separate office.

Q. She did clerical general duties, as well, didn't she?

A. Yes, she did.

Q. For example, she took the orders in if they came over the telephone, if they came in in the afternoon?

A. Yes, she did.

Q. So she was physically present, at any rate, wasn't she?

A. Yes.

Q. And after her was a woman by the name of Elizabeth Carson?

A. Yes.

[RT 422]

Let me clarify that.

Q. Help yourself.

A. Evelyn worked in the financial secretary's office. When I became business agent my partner, Ben Fenwick and myself,



hired Liz Carson in the business office -- actually had two girls -- so when Liz worked there, that was the first time they had a girl in the business agent's office.

Q. Can you point to any particular time when that book was -- when you went out in a given morning, where you'd inspected the book and made some sort of either mental or written notations of what boxes the men had checked, and who was on the list, then when you came back in the afternoon, you rechecked the book and you found some discrepancies? Could you give us some example of what date that occurred?

A. No, I couldn't give you one date, because it wasn't that important to take note of it.

Q. All right. You didn't find that happened very much, where men had lined out other members' names, put check marks for them indicating work that they really weren't competent to perform?

A. It was -- you found it quite often during a certain amount of areas, yes.

Q. You wouldn't have allowed that to happen without disciplinary action against the men who did it, would you?

A. If you knew the person.

Q. Well, if you saw a man sneak in, if you saw a name there that wasn't there before

filling a blank spot, or something, you would certainly know who it was, wouldn't you?

[RT 423]

A. Yes, you would.

Q. Tell me how many times you brought disciplinary action to somebody in that category?

A. I couldn't really tell you. I've brought it out and mentioned it to the carpenter.

There was times I scratched him off the list and put him at the bottom.

Q. Can you tell us who one of those was, so we can get an example from the list of who you are referring to here?

A. Like I say, it's hard to remember these things.

I do know of one carpenter that I did it to, yes.

Q. Okay.

A. That I recall.

Q. When did that occur?

A. Probably a couple of years ago.

Q. That's one. Can you tell us another one?

A. No. Like I say, it's too hard to remember that type of thing. You have too many things on your mind, too many pressures.

Q. When a man comes in and strikes another man's name off that list, that's a pretty serious offense, isn't it? It's depriving him of work, in a sense, isn't it, or attempting to?

A. Depriving someone else, yes.

Q. It would be serious enough, if it came to your attention, that some sort of charges would be filed against that man, I assume?

A. Well, yes, it is; but everything is

[RT 424]\*

time-consuming. \* You have to remember the time you file the charges, the time you present it to the trial board. You're talking about quite a bit of time.

Q. So, in other words, you can think of one time, definitely, where you found somebody sneaking in, and you struck his name; you can't think of any more specific ones, even in your own mind, and you can't point us to any specific incidents that may be reflected in these sheets that we have in front of us?

A. Yes, now that I get thinking of this, I do recall. In fact, I remember quite well how I handled it.

Q. Okay. What was the date, or about, so we can check these sheets, and you can point it out to us?

A. '68, '69, '70, '71.

Q. All right, give us one in '68.

A. Give you one carpenter?

Q. Yes.

A. Okay. I didn't make a notation of it, what I did. If you remember how I described the way we took roll call, what I did, was the minute the man or the carpenter got in front of me, then I'd tell him to go to the end of the line, or --

Q. That is an attempted sneak-in?

A. Yes. That's how I handled it.

Q. Okay. Who was the man?

A. Well, there are several of them. Several of them.

Q. Name the several men, or as many of them as you can recall.

[RT 425]

A. I don't think it -- I really don't think I can sit here and honestly name you name for name. I could probably come up with a hundred names, if I really wanted. I don't think that's necessary. I'd have to sit here --

Q. I'm only asking for two or three of them.

A. I can sit here and name -- I can name Dick Hill. I know that for a fact.

Q. You are saying on some occasion he signed the list where he shouldn't have?

A. Sure, I'm quite positive. I made him wait his place several times.

Q. All right. Can you tell us where that occurred, where he signed it and you had to change?

A. '68, '69.

Q. Well, what month? We have records for all of '68 here, Mr. Scott. If you can direct us to a specific month, then maybe we can find the week.

A. It was such a small incident that it wasn't worth my time to make a notation of it. Usually you'd verbally tell him to take his turn.

Q. Mr. Scott, I'm not referring to those small incidences where they would get out of place, two or three or four, or maybe five or six. I'm talking about when a man came in and signed the list during the day when nobody was around, snuck his name in; not the situation you're talking about now, when you are at the window writing out the book.

I'm talking about the situation where you weren't there. You told us the books were left

[RT 426] \*

alone all day, and \* all things could have occurred. I'm asking you to give us an example of one.

We have all of 1968 records here, as far as the out-of-work records -- sheets right here, so if you can direct us to one, to tell us what you are referring to.

A. It's not what I'm referring to. What you are asking me, I didn't make notations of it.

I do know for a fact it did happen many times over a four-year period. Not one day, but over a four-year period weekly, by many carpenters.

Q. You are talking about situations where you came in in the afternoon, after examining the books in the morning, then you noticed some changes or discrepancies in the afternoon, and you took some sort of remedial action? That's



the sort of thing you are talking about?

A. Yes. That was the whole purpose of my changing the roll call system, because it was an unfair system, I felt.

MR. HOBART: I will move to strike that answer as being unresponsive, your Honor.

THE COURT: Yes, it is.

Q. BY MR. HOBART: Mr. Scott, can you point to one occasion where you came back in the afternoon, you found somebody's name signed in improperly where it shouldn't have been, that something that occurred presumably in the afternoon for the year 1968? Can you tell us one specific item?

A. No, I cannot; but I can tell you this. I'm sure I can sit there and study those books, and I can point one out.

Q. We will all be here a long time. You  
[RT 427] \*

will have the opportunity.

A. All right.

Q. Can you point to some situation where somebody in the afternoon, when nobody was guarding these books, may have lined out somebody's name, or somehow marked unmarked

boxes for him, offhand? Do you know any incident in 1968 when that occurred?

A. No. Again, I didn't take notations. I'd have to check those books to pick one out.

Q. You indicated there was no reason to keep these white slips, these order slips, in your testimony just a moment ago; is that correct?

A. Yes.

Q. Mr. Scott, can you tell me, for the years of 1967 and 1968, whether there exists any written documents, or grouping of documents, that a person who claims an illegal dispatch was made -- or that numerous were made -- how could he prove that illegal dispatches were made from whatever documents exist?

MR. GEFFNER: Your Honor, I object. That question asks for a conclusion, and is argumentative, as well.

MR. HOBART: I don't think it does, your Honor.

THE COURT: I think it is cross-examination. Go ahead.

THE WITNESS: Repeat the question, please.

MR. HOBART: Yes.

Q. What official documents exist, if any, that we can go to to confirm that a particular dispatch in 1967 or '68 was completely illegal, that is, it was a bona fide request?

[RT 428]

We've got the request forms, and we've got some other notations. What documents exist, so we can check now to see whether illegal dispatches had been made in 1967 or 1968?

A. What form of document to go back to prove --

Q. Yes, sir. What documents exist to show -- for example, if you have an employer request, that should be a written document, and that should conform with something, with the work referral slip that says "Request" on it? That would be evidence, wouldn't it? That would prove that that request was made pursuant to a bona fide written request, which is what you have told us is the procedure?

A. Yes.

Q. Now, my question is, since we can't find a good many of these documents -- you say they don't keep them, and there's no reason to keep some of these documents -- what records do exist; what other records exist, or notations, so the person could go back and double-check the business agent's dispatches to see if a given dispatch, or a series of dispatches, were valid

and met the procedures for dispatching?

A. There's no documents or records whatsoever, that I know of.

A carpenter knows where he's at on the book. He knows when it's his turn to be dispatched. Consequently, there's very few times that you'd ever have this type of a discussion with the members.

Q. You're saying the union policy is that if it's of insignificant proportions, substantially

[RT 429] \*

enough so that you \* don't keep the records to maintain a position where you could verify the legality of a given dispatch -- in other words, you don't consider that to be a sufficiently important purpose in order to keep records?

A. I didn't then, but I can assure you now I think different.

The questions you are asking me, there's no way I can answer it. I have no -- for me to even go back right now prior to the time I was a carpenter, I'd have a hard time finding the job sheets of contractors that I worked for. I just don't retain that information.

Q. You know how to get that information, don't you?

A. Sure.

Q. Call the Health & Welfare. They've got records, don't they?

A. Yes, they do.

Q. Now, Mr. Scott, with respect to these records, if you have an employer request, or if you have an order, a phone order, under the rules and regulations, you must give a work referral document; is that right?

A. Yes.

Q. Then the man with the work referral slip goes off to the job. Now, if you go this way, you take his name off the out-of-work sheets, right?

A. Yes.

Q. If we had the out-of-work sheets, the work referral slips -- strike the question.

By the way, the work referral slips, if

[RT 430] \*

the man \* is sent out on a request, the work referral slip has the work "Request," generally, abbreviated on it, doesn't it?

A. Yes, it does, or it has an "R."

Q. Some notation, at least, that it is a request?

A. Or he might even forget to put the "R" on there.

Q. I suppose anything is possible.

Now, this gives us four documents; the white slips, the out-of-work sheets, the work referral slip, the employer request. These are four written documents used in a matter of procedure for ways of dispatching a man out of that hall in 1969 and '68; is that right?

A. Yes.

Q. Now, if any of these documents are missing, for example, we don't have any work referral slips, then we don't have any way to determine whether the word "Request" written on the work referral slip really was a bona fide request, do we?

A. No, but I might add at this time, too, that's not really an accurate record. Many carpenters come and get requests -- work referrals on a request, and never report to the job, changing their mind.

Probably 75 percent of our carpenters are not from our hall, are from some other local. We have had carpenters that have gotten requests as many as three times in one day, and never reported to the contractor.



Q. Listen to my question, Mr. Scott.

If you don't have the employer request form, or some written notation, or other notation

[RT 431] \*

that he made a \* request, then there is insufficient evidence to establish whether or not a work referral that says "Request" on it was, indeed, a written request; is that correct?

A. Correct.

Okay, let me clarify that, then. We do keep these records, and we keep them approximately one year. We've got more records now than I think any local union, as far as keeping records.

MR. HOBART: I will move to strike that your Honor, as being speculative as to what other unions have.

THE COURT: All right.

Q. BY MR. HOBART: But without this document -- to get back to this point, without the employer's written request document, we have no way of knowing whether the name was a bona fide request, or whether somebody had just written the name on there and dispatched the man. That's true, as far as that statement goes, isn't it?

A. Yes, that's correct.

Q. You indicated that a man who signs an out-of-work list, and who does not check a box, that that means the same thing as a man who signs and checks all boxes, or runs a line across all boxes. It means he is available for anything; was that your testimony?

A. That's the way it was explained to me by some people. Some people interpret it differently. I don't interpret it that way.

Q. I am under the impression --

A. Every business agent interprets a

[RT 432] \*

dispatch sheet \* any way.

Q. Isn't it true you interpret that the guy is not available for any work?

A. No, I don't interpret it that way. That was the way it was explained to me.

Q. What does it mean to you, that he's available for all work, or not available for any?

A. It means he was available for all types, is the way it was explained to me.

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[RT 471]

RICHARD T. HILL,

the plaintiff herein, called as a witness on his own behalf, having been sworn, testified as follows:

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[RT 472]

DIRECT EXAMINATION

[RT 518]

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Q. Did you go back to the hiring hall in the ensuing days that followed, at least one more week?

A. I don't think I went much longer back there. I don't know how -- I was getting pretty sick about this time.

Q. Now, we know that on March 27th, Mr. Hill, you had signed the book on page 2.

A. That's right. That's probably the last week I signed the book.

Q. When you signed the book, then, do you recall complaining about certain people signing the book ahead of you and getting jobs, anything of that nature; any sneak-in complaints?

A. I told Daley, and I showed him different ones on the book. I showed him. I picked a name right out to him on the book.

I couldn't do it right here at the time,

[RT 519] \*

but I did \* then. These guys was working, and I asked him how they were getting out to work.

Q. Mr. Hill, in looking at the sheets for March 20, 1967 -- that's the bottom sheet that my hand is on here. Count up, if you would, five places and six places from your name, above your name.

A. One, two, three, four, five, six.

Q. Okay. On the sheet for March 20, who were the fifth and sixth people above your name?

A. Henry Sloan and Bill Midgett.

Q. All right. Is there -- okay. Henry Sloan, Bill Midgett, and Jesse Turner?

A. Yes, three of them.

Q. Between those names and your name do you see the name Leopoldo Hernandez or Emigdio Marques?

A. Yes.

Q. Okay. You see them on the March 27th list; is that right?

A. That's correct.

Q. Do you see them on the list of the preceding week?

A. No, they're not there.

Q. Now, Mr. Hill, with respect to these two gentlemen, Emigdio Marquez and Mr. Hernandez, they both were dispatched, according to these records; is that accurate?

A. That's what it shows there.

Q. Do you recall if you had been offered this job at Millie & Severson, it looks like?

A. I don't think so.

[RT 520]

Q. Do you have any recollection of you being offered that job?

A. No, no. I wouldn't know for sure, but I don't see nothing there. The name don't even ring a bell.

Q. Were you offered any job when you went back on the list, prior to the time you terminated --

A. The only job I was offered was the Steelform job that I refused.

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[RT 538]

Q. Mr. Hill, I'd like to show you the out-of-work sheets for May 1, 1967.

Again, they are still being typed, but is it correct that your name is on page 12 at about line 10 or 11?

[RT 539]

A. That's correct.

Q. All right. Now, when you went back to work, or when you went back to the out-of-work list, did you make an effort to obtain employment on your own?

A. I did. I saw I wasn't going to get nothing at the hall.

Q. Well, when you first went back to work, did you make a request of anybody for a special consideration in some manner, for a sick man returning?

A. Well, it's been the practice of the local there. Yes, I made a request of Daley and Wilk, and the whole bunch. I said, "I have been laid up for 30 days, and I'm just coming out of the hospital, and give" -- it's been the practice of that local to put them back on the top of this list when they come back after being sick.



Q. Did Mr. Daley put you at the top of the list?

A. He said, "You can go back to the bottom of the list, and forget about it," and that's all. I just signed my name in the usual place, and forgot about it.

Q. After you had done that, with respect to some other employer, what did you do next?

A. Then I started canvassing the area. I went down to a building under construction over here at 6th and Grand, Simpson-Dinwiddie Construction Company. There were a couple of foremen on there I had knew for years. I worked for them before. I worked for Simpson Company, as well as the Dinwiddie Company. It was a joint venture on this particular building, however.

[RT 540]

Q. All right. You went down to this job -- which building is that in Los Angeles?

A. It would be the Crocker-Citizens, now completed, at 6th and Grand; right between Grand on 6th.

Q. What was it you were attempting to do when you went to that --

A. Secure carpenter work.

Q. To try to get a request?

A. See a foreman there that I know, and get a request -- or see the superintendent, didn't make no difference, whoever was in charge of the job.

Q. Can you tell me the names of the people you saw when you were there?

A. I saw the superintendent. His name was, I think, William Simpson -- no relation to the company. There was a foreman by the name of Curt Gillie I saw there. Different occasions I saw another guy by the name of Larry Buetner. There was a general foreman I talked to by the name of Fred Coukos.

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[RT 542]

MR. HOBART: Your Honor, with respect to the deposition of Charles J. Simpson, which was taken on January 15, 1970, at the construction site of Pacific Gas & Electric Company building, 202 Mission Street, San Francisco, California.

It was taken before Priscilla Q. Loberg, a notary public in and for the City and County of San Francisco, State of California, at which time Mr. Simpson appeared, and at which time I appeared as counsel for plaintiff, and the law firm of Geffner & Sztzman was represented by Leo Geffner.

Also present was Mr. Ben Fenwick,  
Business Representative of Carpenters Local 25;

"Q. Will you give your full name for the  
record, please?

"A. Charles J. Simpson.

[RT 543]

"Q. What is your present job and  
capacity?

"A. I am construction superintendent for  
Dinwiddie Construction Company."

I'm going to skip some now, your Honor.  
I don't think it's all relevant. I'm going to go  
next to line 18 on page 2, through line 9 on page  
3:

"I am sure that you have either had  
depositions taken before, or you know what they  
are, but just for the record, let me give you a  
little preliminary data.

"First off, as you know, this deposition  
is taken in an informal atmosphere, but you have  
been sworn to tell the truth and your testimony  
here is under the same sanctions, perjury, et  
cetera, that there would be if given in a court of  
law. Do you understand that?

"A. I do.

"Q. My questions today are going to  
concern incidents relating to Richard T. Hill, my  
client, and they will pertain generally to the  
situation involving Hill being hired or not hired  
on the Dinwiddie-Simpson Construction site back  
in May 1967. Do you understand that?

"A. Yes, sir.

"Q. If you do not hear any of the questions  
that either Mr. Geffner or I ask, or if you do not  
understand them, we will expect you to ask

[RT 544] \*

us to \* repeat them or rephrase them in order  
that you do understand the questions. Do you  
understand that?

"A. Yes, sir."

Next, your Honor, from page 4, line 1,  
through page 10, line 9:

"Q. With that in mind, I will get right  
into the general issues that I want to talk about.  
Prior to May 1967, had you ever made oral  
requests from Local 25 for individual workmen  
to be sent out to the jobsite?

"A. I had.

"Q. And had those requests been honored  
on one or more occasions?

"A. To the best of my recollection, yes.

"Q. Do you ever recall, prior to the 1st of May, any union official telling you that he could not or would not honor any oral request that you had made?

"A. No, I don't.

"Q. Now, on or about May 1, perhaps a day or two before that, did you make a request for four workmen from Local 25, request that they be dispatched to that Dinwiddie-Simpson construction job?

"A. At about that time, yes. The dates are a matter of record which I can't really independently recollect at this time.

[RT 545]

"Q. Does the date of around May 1st sound about right to you?

"A. It does.

"Q. Now, what was the job that you were working on at that time?

"A. Crocker-Citizens National Bank.

"Q. Where was that located?

"A. In Los Angeles, 6th and --

"Q. Olive, would it be?

"A. No, Grand, 6th and Grand.

"MR. GEFFNER: Grand to Hope.

"MR. HOBART: Q. Had that job been in progress for a period prior to May 1, 1967?

"A. Approximately -- yes, it had been in progress for some months.

"Q. And prior to the 1st of May, 1967, had you hired carpenters for that job?

"A. I had.

"Q. Do you have any estimate as to how many months you had been hiring carpenters on that job, prior to May 1st?

"A. Approximately a year.

"Q. I see. During that period of one year, if I understand your previous answer, you had made certain requests for individuals, is that correct?

"A. Would you repeat, please?

"Q. Surely. Prior to May 1st, had

[RT 546] \*

you \* made oral requests for named, individual



carpenters to come out to the jobsite?

"A. I had.

"Q. And do you have any recollection of any of them being denied you?

"A. No, sir.

"Q. At any time prior to May 1, 1967, had any official or member of the Union, that is, Local 25, advised you that you could not make requests for any of the following reasons:

"A. Because the Dinwiddie-Simpson job was a joint venture, and therefore nobody had worked for that joint venture prior to that time? Had that ever been given to you as an excuse for rejecting your request for carpenters?

"A. Not to my recollection.

"Q. At any time prior to May 1, 1967, had an excuse been given - and this will be 'b' under my itemization - on the basis that you had requested more than 25% by name for that jobsite?

"A. Not to my recollection.

"Q. Had the figure or the general discussion of the 25% quota been brought to your attention at all on that jobsite prior to May 1, 1967?

"A. By Union representatives?

"Q. By Union representatives.

"A. Not to my recollection.

[RT 547]

"Q. I take it from your answer that you may have had some information regarding that quota from Management's side.

"A. Yes, right.

"Q. But no member from the Union or your employer, or agents of the Union, had ever advised you that the 25% quota was being considered, or that they were keeping tabs?

"A. No, sir. We were aware of that possibility, but it seemed to cause us no trouble.

"Q. Do you know as a matter of fact whether your requests did or did not exceed the alleged quota of 25%?

"A. Not exactly, no.

"Q. Was it your policy at that time that unless the Union raised the issue, you were not going to spend any time on the mathematics, figuring it out for yourself?

"A. It was our policy to keep in the area of 25%, not necessarily exactly; below.

"Q. Was it part of your policy that in the event you exceeded the 25%, you were going to leave it to the Union to bring it to your attention, or were you going to search it out for yourself?

"A. I don't quite understand.

"Q. Let us say that you hit 27%. Would it have been your policy at that time to

[RT 548] \*

check \* your own records to determine that you had exceeded the 25%, or was it your policy to let the Union bring it to your attention, that you were over 25% in your requests?

"A. It would be my policy to let the Union bring it to my attention. However, I didn't want to be very far out of line. A few percent would seem reasonable, and I thought the Union would also think it reasonable, if I was within the general area of 25%.

"Q. During that period that you were the superintendent, prior to May 1, 1967 and subsequently, were you aware of the general nature of the Union Hiring Hall Procedure? And by that I mean that if you did not request people by name, that they would, or were supposed to, send people to you off the top of the list as they

fit the category requested?

"A. Yes, sir, I was aware of that.

"Q. Now, around May 1, 1967, did you make a request for certain workmen where that request was not honored?

"A. I did.

"Q. To the best of your ability to recollect the names of the individuals who were on that request, or who were requested, will you tell us who they were?

"A. I remember Mr. Hill and Mr. Wallace.

[RT 549]

"Q. Do you remember how many people were requested totally?

"A. I believe it was four.

"Q. And Mr. Hill and Mr. Wallace were two of the four?

"A. Yes, sir.

"Q. Was that request a written request, or was that an oral request given by you?

"A. I believe that was a verbal request.

"Q. When you would make a verbal request, was it your practice to call the dispatch office either that morning or the evening before?

"A. It was.

"Q. And do you recall if your call went into the Local 25 office the evening before, or was it that morning that you wanted the men?

"A. I am sure it would be the day before. It was not my practice to call in the same morning that I wanted men.

"Q. I see. When you called into the office, did the person you were talking to identify himself or herself to you by name?

"A. I believe never.

"Q. You have a recollection at this time as to whether it was a man or a woman with whom you discussed that oral request?

"A. No, sir, I don't.

"Q. Regardless of whom you talked

[RT 550] \*

with, \* was there any indication at that time by the person you talked to that your request would not be honored?

"A. I believe not.

"Q. Was there anything different from prior oral requests that occurred with that particular oral request?

"A. No, there was nothing unusual about this request.

"Q. I gather from your answer that nothing occurred in your conversation, or in the general request procedure made by you on that day, that made it unusual in any respect; is that correct?

"A. That's my recollection.

"Q. Disregarding the two names you do not recall, on the next day after the request was made, did either Mr. Hill or Mr. Wallace come to the jobsite?

"A. To work?

"Q. Yes.

"A. No, sir.

"Q. My question, to be more direct, was, or should be, were either of them dispatched to work for Dinwiddie-Simpson Construction Company on that day?

"A. No, sir.



"Q. What were the conditions,

[RT 551] \*

circumstances \* and facts surrounding your request for Mr. Hill for that jobsite, at or around May 1, 1967?

"A. His name was given to me by my Assistant Superintendent.

"Q. What was his name?

"A. Mr. Fred Coukous, C-o-u-k-o-u-s.

"Q. Or something like that?

"A. And I similarly relayed this name to the Union, which was the normal practice on that job.

"Q. Did you know Mr. Hill personally?

"A. I did not.

"Q. Had you met him before that, before the day you had requested his name?

"A. No, sir.

"Q. In regard to whether or not you had met him before, do you have a recollection of his coming out to the jobsite within a day or two days prior to the day he was requested at all? Do you have any recollection of that?

"A. I recall him coming to the jobsite, but at this time it seems to me it would be after I requested him and not before.

"Q. At any time after you made the request for Mr. Hill, or at any time before, did you learn how Mr. Coukous happened to obtain his name?

"A. Yes. Mr. Coukous was my

[RT 552] \*

Assistant \* Superintendent and he had several carpenter foremen working under him. And one of the foremen asked Mr. Coukous to pass along this name, Mr. Hill's name, for my request for another carpenter.

"Q. To your best knowledge and information, who was the foreman making that request of Mr. Coukous?

"A. I don't know now, and I'm not sure that I ever knew.

"Q. Do you have a recollection of Mr. Hill coming to the jobsite one or more days before the day you requested him, and saying something to you to the effect that, 'It would sure be nice to work here,' something along those lines? Does that refresh your memory at all, my saying that?

"A. No, sir, it doesn't."

Going right on, your Honor. I said I'd stop at that point, but there's just two more questions here.

THE COURT: Well, I suggest you finish what you were going to read, then we will take our recess, and Mr. Geffner may take that recess time to select portions he may want to read.

MR. HOBART: All right, fine.

THE COURT: Go ahead.

MR. HOBART: No, I have more. I was saying I was going to stop on page 10, line 9 --

THE COURT: I know, but you are going on.

[RT 553]

MR. HOBART: Yes.

Well, there are several itemizations. The majority of it is done, but there are still fairly lengthy parts; so if your Honor wants to take the break -- or I can continue, whatever you wish.

THE COURT: Well, I think you might as well continue, then we will take a break.

MR. HOBART: All right.

At line 14, on page 10:

"Q. Did you learn the next day after the request had been made to the Union that the men you requested were not dispatched?

"A. I did."

Now, I'm going to skip, your Honor, over to page 11, line 19 to line 25:

"Was the first conversation with any official of the Union that you have a recollection of, pertaining to the requested men or any of them --

"A. It was a few days after they were requested that Mr. Daley came on the job. And at that time I approached him on the possibility of getting one of these men on my job, dispatched to my job.

"Q. Who was that one man?

"A. That would be Mr. Wallace."

Now to page 12, line 10 through line 21:

"Q. During this interim from the

[RT 554] \*

time \* you made the request to the time Mr. Daley came to your office, did you learn through the grapevine about some of the political personalities and goings-on within Local 25?

"A. Well, I learned that Mr. Hill was a political opponent of Mr. Daley. How, as far as 'goings-on within the Union,' I wasn't a party to any of that.

"Q. Do you recall from whom or how you learned that Mr. Hill was a political opponent of Mr. Daley's?

"A. I believe that Mr. Coukous got that information from his men in the field and relayed it to me."

Page 13, line 17 to page 14, line 10:

"Q. Then I take it within the next few days Mr. Daley came out to the jobsite?

"A. That's right.

"Q. And when he came out, what did you say and what did he say with respect to the men who had been requested, or any one of them?

"A. Well, knowing that there was this political situation which was -- I didn't want to

get involved in, I simply inquired as to the possibility of getting Mr. Wallace on the job. And he replied, in effect, that yes, he could arrange that.

"Q. Did he make any comment about the  
[RT 555]

other four being rejected, or why he did not send you Mr. Wallace?

"A. You mean the other three?

"Q. Yes.

"A. He simply said words to the effect that Mr. Wallace was going with the wrong gang.

"Q. And based upon what you had already learned from Mr. Coukous, did you form some conclusion about what he meant by that, or some opinion?

"A. Not really.

"Q. Did you form an opinion that Mr. Daley meant that Mr. Hill was a political opponent and, when you put them all together, Mr. Wallace was in the wrong gang?

"A. I concluded that he meant, gee, I will ask for those other fellows because that's the only thing I was interested in, or could be interested in. I certainly wasn't interested in the Union politics angle of it."



At line 21, your Honor, on page 14, through 22 on page 15:

"A. Yes. I concluded that he meant by his remarks, 'Gee, don't ask for these other three fellows.'

"Q. But if you wanted Wallace, that would be all right?

"A. Correct.

[RT 556]

"Q. Had you ever had any meeting such as that with Mr. Daley prior to that time, any conversations with him, whether face to face or over the telephone?

"A. Oh, yes, we have had many occasions. We have on many occasions met on the job, both prior and after.

"Q. When you met with Mr. Daley on these various occasions, what was your opinion as to his rank within the Union, within Local 25?

"A. I understood he was the Business Agent, or possibly should say the Chief Business Agent.

"Q. As far as you were concerned, he was the number one man to deal with in the Union?

"A. That is correct."

Line 15, the same page, 15:

"Q. Now, either before or after that meeting you had with him, the one we have just talked about in May 1967, did Mr. Daley ever suggest to you names of workmen to request?

"A. Not to my recollection, but it certainly wouldn't be unusual.

"Q. What do you mean by that?

"A. I mean union officials, at the start of a job, often tell me, 'Gee, we have a good man in there,' or 'A couple of good men in there. Can you use them?' That's very common."

[RT 557]

Page 20, line 7 through 21, referring, again, to Daley:

"Did he say to you, or imply to you in any way that you could understand, that he was not aware of that request?

"A. There was no implication one way or the other in that regard.

"Q. Well, in referring to the gang, he must have been referring to something else, unless you had raised the issue. Do you recall?

"A. I think I should modify that statement by saying that his reference to the 'gang' would indicate that he was aware of the request.

"Q. You had --

"A. There was no discussion, no mention of it.

"Q. Your discussion was centered around Roy Wallace?

"A. That was my question to him.

"Q. What is your best recollection of what you said to him about Roy Wallace?

"A. I can only recall the substance of it, that I personally knew Roy Wallace and I would like to have him on my job, if he could be dispatched.

"Q. Did you ask him in so many words why Roy Wallace had not been dispatched to you?

"A. No, sir, I did not. I would

[RT 558] \*

consider \* that an irritating question and I wouldn't do it.

"Q. It would just make things more difficult to get Roy Wallace by raising that sort of a question?

"A. I think it would put Mr. Daley on the spot. He would either have to refuse to answer me or explain his actions. And I felt it was out of order for me to get into that aspect. And I purposely would stay away from asking about problems that they were having among Union people."

Page 21, line 14:

"Q. And you had not at that point raised the issue of the fact that you had put Mr. Wallace in with three other people previously?

"A. I don't believe I had.

"Q. So then that would be a spontaneous reply on Mr. Daley's part when he referred to that gang?

"A. I believe it would.

"Q. With respect to Mr. Wallace, did he come out to the jobsite and ask you to request him?

"A. He did.

"Q. And did you request him?

"A. I did.

"Q. And did anybody ever raise any objection to you that he had come and asked you directly for a job?

"A. No, sir.

[RT 559]

"Q. When you had the conversation with Mr. Daley about requesting Mr. Wallace specifically, did he raise that as an issue at all?

"A. Raise what?

"Q. That Mr. Wallace may have asked you directly for a job.

"A. No, sir.

"Q. As a matter of fact, that was a fairly common practice with the members of the Caprenters' Union, isn't that true?

"A. It is."

I believe I have nothing further from the deposition, your Honor. At least, nothing I can see on a quick summary.

THE COURT: All right, then we will take a 10-minute recess and resume the reading, if the defense wants to read any parts of this deposition.

The jury is given the customary admonition.

(Recess.)

THE COURT: All right. Do you have anything to add?

MR. GEFFNER: I'd like to read a portion of the deposition, your Honor, that I don't believe was read by Mr. Hobart.

MR. HOBART: Well, your Honor, there was quite a bit in the deposition I didn't read.

THE COURT: Yes.

MR. GEFFNER: This is Mr. Hobart questioning Mr. Simpson, starting on page 15, line 11:

[RT 560]

"Q. Now, during any other prior meetings or conversations with Mr. Daley, or any subsequent meetings or conversations with Mr. Daley, did you ever discuss with him the request procedure at all?

"A. No, sir.

"Q. Now, either before or after that meeting you had with him, the one we have just talked about in May 1967, did Mr. Daley ever suggest to you names of workmen to request?

"A. Not to my recollection, but it certainly wouldn't be unusual.



"Q. What do you mean by that?

"A. I mean Union officials, at the start of a job, often tell me, 'Gee, we have a good man in there.' or 'A couple of good men in there. Can you use them?' That's very common.

"Q. Do you recall ever having Mr. Daley ask you to request Everette Trimble?

"A. I dimly recall that. I believe that's correct, that he did.

"Q. Do you recall the circumstances around that?

"A. Mr. Trimble, when he came on the job, was the steward, and I believe that I had a problem with the steward who was on the job, and I asked Mr. Daley to make a change. And this was part of the procedure of getting a new

[RT 561] \*

steward \* for me, was for me to ask for Mr. Trimble. That is my recollection.

"Q. You were dissatisfied with your steward on the job, is that correct?

"A. That is correct.

"Q. And you asked Mr. Daley to change stewards, is that correct?

"A. In effect, yes."

Going over to page 17, starting at line 16:

"Q. Can you recall on any jobsite at any time any other business agent, whether it be Mr. Daley or anyone else, suggesting to you, for one reason or another, the names of any particular workmen to request?

"A. No, I don't recall that.

"Q. You recall that it has happened, but you just don't remember the people who asked you and the people requested?

"A. Now you are talking about that job in Los Angeles?

"Q. I am talking about any union job at all now.

"A. Anywhere?

"Q. Anywhere in Los Angeles.

"A. Oh, well, even so -- No, I don't recall any names or any specific instances.

"Q. But you do have a recollection that it occurred?

[RT 562]

"A. As the statement there says, it's quite a common practice.

"Q. Who else would a union representative make this request of on a jobsite? Let's say like on the Dinwiddie-Simpson jobsite. Would a union representative make that request of anybody else? In other words, did anybody else have the authority to make requests?

"A. Mr. Coukous would have the authority to on that job.

"Q. Could he make them direct to the Union?

"A. He could.

"Q. Or would you have to go through --

"A. He could have.

"Q. He could have made them direct?

"A. Yes, sir.

"Q. Have you discussed that matter with Mr. Coukous?

"A. I don't recall. We had a very good working relationship there, and it would not have been out of order for him to do so.

"Q. Is Mr. Coukous still in Los Angeles?

"A. I believe he is.

"Q. Still with Dinwiddie?

"A. No, the William Simpson Construction Company.

[RT 563] \*

"Q. Were you and he of equal position, \* then?

"A. He was under me.

"Q. Let me see if I can summarize accurately what we have just been discussing. The request for specific names by union officials does occur periodically, but you have no specific recollections of the individuals involved on either the requesting end or the union official end.

"A. Outside of Mr. Trimble, that is correct.

"Q. In your conversation with Mr. Daley, did you reinforce the opinion that you had that there was political animosity between him and Mr. Hill?

"A. It was not discussed in those terms at all.

"Q. Mr. Hill's name was never brought up?

"A. I believe not."

Over to page 29, line 11 -- line 12:

"Q. Now, when the four men were requested, did you have personal knowledge of any of the four men, except Mr. Wallace?

"A. No.

"Q. But you knew Mr. Wallace?

"A. I did.

[RT 564] \*

"Q. He worked for the company on prior \* occasions?

"A. No, he had not worked for us before.

"Q. He was just a personal acquaintance? Let me rephrase the question. You knew him to be a competent carpenter and you wanted him on the job, is that correct?

"A. I didn't know -- Well, he had worked for the William Simpson Company before, and the job he was on terminated and an official in the Simpson Company asked me if I could arrange to put him on my job. However, I also knew Mr. Wallace personally.

"Q. Do you know whether Mr. Hill had ever worked for Dinwiddie Company prior to

May 1, 1967?

"A. No, I don't know.

"Q. You have no knowledge?

"A. And I still have no knowledge.

"Q. Have you knowledge as to whether he had worked for the Simpson Company prior to May 1st?

"A. That I don't know, either. I probably did know at the time this was all stitched up, but I have forgotten now. I don't know.

"Q. Now, as I understand your testimony, after your request of the four men, which was made verbally by a call to the Union, you then gave the timekeeper the list of names of the men so the timekeeper would have some record.

"A. I don't believe I said that, and

[RT 565] \*

I \* am not sure I did it. But I am sure the timekeeper would know that I had an order in for four carpenters.

"Q. The timekeeper may or may not have given their names?



"A. That is correct."

MR. HOBART: I think you should re-read that question.

MR. GEFFNER: All right.

"Q. The timekeeper may or may not have given their names" --

MR. HOBART: "...have been given their names."

MR. GEFFNER: "The timekeeper may or may not" -- I'll try once again.

"The timekeeper may or may not have been given their names?"

"A. That is correct.

"Q. When Mr. Daley came to the jobsite a few days afterwards, if I understand your testimony, the entire conversation related to Mr. Wallace, except --

"A. Related to Mr. Wallace, yes.

"Q. You may have been discussing other things, but as far as this problem was concerned --

"A. It was a very short conversation, and it related almost entirely to Mr. Wallace.

"Q. You asked whether Mr. Wallace could be referred to the job?"

"A. Right.

[RT 566]

"Q. You did not mention Mr. Hill at all?"

"A. No, sir."

MR. HOBART: Okay, your Honor, if I may pick up where Mr. Geffner left off.

THE COURT: Very well, on page 30.

MR. HOBART: Yes, he left off with page 30, line 24, which is the last question.

Page 31, line 1:

"MR. HOBART: Just one more, Mr. Simpson, with respect to that conversation with Mr. Daley. After he had made the reference to Mr. Wallace being associated with the wrong gang, did you interpret that to mean he was referring to the other three men who had been requested?"

"THE WITNESS: That is correct."

I'd like to read, your Honor, from page 24, line 14, to page 27, line 25:

"Now, again I am going to read you a paragraph or two from your NLRB testimony, and I am reading from page 62, and starting with line 9:

"'Q. Mr. Levy' -- attorney for the Union -- 'In response to a request by the Union, you said that before this incident involved Wallace and Hill arose, that you made oral requests to Local 25 which was honored. You had reference, did you not, to oral requests for dispatch of a number of men, not dispatch of men by name?

[RT 567]

"'A. No, sir, I did not. I had reference to a request of men by name. Now, these requests were usually' -- this is still your answer, now -- 'These requests were usually talked over a little with Mr. Daley or some other Business Agent to see how they felt about it.'"

Back to my question, now:

"As far as enlargement on that statement, what information could you give me? What would the circumstances be?

"A. I can only say at this late date what my general policy is that would seem to fit in with that, and if there are few or no men in the Hall, it is much easier to get many specific requests granted because they don't have to pass over anyone to get them to me. Also, I, on occasion, just to take the pulse of the business

agent, so to speak, to see if -- is he going to be agreeable to a few requests, because I don't like to put in requests and have them turned down flat. When I put in a request, I like to have it in a position of being honored.

"Q. Did you have the practice of checking the pulse of the business agent, so to speak? Was this your practice before the Hill incident or was this the practice?

"A. Yes, that had been my practice for many, many years before the Hill incident.

[RT 568]

"Q. As far as Local 25 is concerned, do you have any recollection of any situation where you had discussed, requested men with any of the business agents?

"A. I can't recollect that now. It quite probably happened, but I just can't recollect.

"Q. Again, from the transcript of your testimony before the NLRB, beginning at line 25, page 69" --

This is a quotation from the NLRB transcript --

"'Q. I believe you testified that on certain occasions Mr. Daley would come out and speak to you about whether or not these oral requests would be complied with, is that correct?

"A. It would be more in the nature that you would approach Mr. Daley at an opportune time and see how he felt about my putting on a couple of men that I had in the wings, so to speak.'

"Does the reading of that more or less refresh your memory on this type of situation with Mr. Daley?

"A. That fits in with my general thinking.

"Q. Would part of your feeling-out of Mr. Daley be to see if he objected to the name of any one or more names of the people you are suggesting?

[RT 569]

"A. No, I believe not. I don't think I would normally mention names or discuss certain persons. I would just say, 'I have a couple of men.'

"Q. I see. Page 72, line 13" -- again referring to quotations from the NLRB transcript --

"Q. Did you know sometimes that you were not going to get a favorable action, that is, with reference to requests given Mr. Daley?

"A. Yes, sir.

"Q. And did Mr. Daley or any of these other business agents ever give you a reason why you were not going to get a favorable action?

"A. I don't recall that any was ever given."

My question:

"Does that mean there were occasions that you got unfavorable reactions from Mr. Daley or some other business agents about a proposed person or two?

"A. Yes, sir.

"Q. And that you just do not remember what the reason was, or do you have any recollection of what any reason was, prior?

"A. Yes, a common reason is that, 'We have so many men out of work that we just can't do it at this time.'

[RT 570] \*

"Q. Aside from that, do you recall any \* other reason given you?

"A. I don't remember any other specific reason being given.

"Q. Do you, even up to this date, have any independent understanding of the procedure



whereby a steward is appointed on a job, aside from what you have been told by business representatives? Have you read it in black and white anywhere?

"A. Yes, it's spelled out in our Agreement.

"Q. There is nowhere in that Agreement, is there, that you know of, Mr. Simpson, where in order to change stewards they have to send out a new man?

"A. I don't believe there is anything like that in the Agreement, no.

"Q. They have a right to appoint a steward after a man has been dispatched to the jobsite, isn't that basically your understanding?

"A. Yes, sir.

"Q. It would not be necessary to send out a new man to replace a steward, particularly someone from the bottom of the list or elsewhere, in order to get a change of stewards?

"A. I believe that's correct."

Q. BY MR. HOBART: Now, Mr. Hill, when you left the Dinwiddie construction site,

[RT 571] \*

you have told us that your frame \* of mind was that you had a request coming in; is that correct?

A. That was my feeling on the matter, yes.

Q. Did you that day, or any other day, make any contact with the union office concerning that matter?

A. Yes, I went right up in the union hall next morning with my tools, ready to go to work. I got by the dispatch window, and Mr. Daley --

Q. Prior to that, did you have any conversation with Evelyn Folick?

A. Oh, yes. She's the office secretary there.

Q. When was it that you had that conversation?

A. Same time, in the morning. She was there.

Q. Was that before or after Mr. Daley's --

A. Before I talked to Mr. Daley -- or after, I don't know which. See, they are all in the same office. I don't know whether it was before or after.

Q. All right. With respect to Mr. Daley, was your name called that morning of May 1, 1967, to go to work on the Dinwiddie-Simpson job?

A. No, it wasn't. There were men dispatched to that job, but my name wasn't among them.

Q. Did you inquire of Mr. Daley as to why you weren't dispatched?

A. Yes, I was quite furious. I went up to the window --

Q. What did you say to Mr. Daley?

A. I said, "Blackie, now, by golly, look. I went out on that job yesterday, and I happen to

[RT 572] \*

know for a fact that \* one of the foremen put over a request for me over the telephone, an order for four men." He says, "You're a goddamn liar. Get away from this goddamn window. If you did get a request, I wouldn't honor it, anyway. I'd make toilet paper out of it."

And I went back to the Dinwiddie-Simpson to verify.

Q. Before you went back, did you have any other conversations with Mr. Daley, or was that all there was?

A. Well, that's -- I went in to the girl in the office and talked to her. In other words, I tried to check the verbatim of the request.

Q. All right. That was later in the morning?

A. Yes.

Q. When you went into the office and talked to the girl there, who was the girl?

A. Evelyn Folick. She was a secretary at the time.

Q. Was she an employee of Local 25?

A. Yes, she was.

Q. What was her job title?

A. Office secretary.

Q. And what did you ask her?

A. I said, "Evelyn, I understand that William Simpson telephoned in a work order for" -- I was under the impression it was half a dozen carpenters, and I said, "Was my name amongst them?" is all I asked her.

Q. What did she say to you?

A. She says -- well, she was kind of adamant. She didn't give me any direct answer

[RT 573] \*

yet. "There was an order \* for six carpenters,

but I'd rather not discuss it. You'd better talk to Blackie," and that's the answer she gave me.

\*\*\*\*\*

Q. BY MR. HOBART: Mr. Hill, did they actually admit to you that your name was on there? Did she, or did she not "Yes" or "No"?

A. Well, to my recollection, I wouldn't say for sure. She admitted there was an order there for five or six carpenters, and as far as I can recall, she gave me an inkling that my name was on, or not on it. She got -- I wouldn't remember. She got scared and just hushed up right away.

Q. When you left the office, where did you next go?

A. I went back down to the Simpson-Dinwiddie job then.

Q. Who did you see when you got there?

A. Before this time I went down to see Mr. Simpson again, himself, personally.

Q. Were you able to see him?

A. Yes, I got up in the office to see him.

Q. Okay. Now, again, you can't say

[RT 574] \*

anything he said, \* because that's hearsay, aside from what's in the deposition.

When you were there at the jobsite, did you discuss getting yourself another request from anybody?

A. Yes. I don't think it was that very day, but I had a conversation with another foreman. He came through there, and he says, "Jeez, I thought you" --

Q. You can't say what the other foreman said.

A. I discussed it with another foreman.

Q. Okay. Who was the other foreman that you discussed it with?

A. His name was Larry Buetner.

Q. Now, Mr. Buetner was a foreman on the Dinwiddie-Simpson job?

A. Pretty sure of it.

Q. This is the same job we have been talking about?



A. That's correct.

Q. How many days after May 1st was that?

A. Oh, it would be a period in there -- I don't know, could be five or six days. Wasn't very far.

Q. Now, after you had talked with him, did you have any frame of mind as to whether you were going to be requested by him?

A. By him?

Q. Yes.

A. When I left the job after talking with him, I was under the impression that he was also going to put a request in for me.

Q. Did you ever receive a request for

[RT 575] \*

that job -- \* strike that.

Were you ever dispatched on that job at all?

A. No, I wasn't.

\*\*\*\*\*

## APPENDIX

# IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75 - 804

JOY A. FARMER, Special  
Administrator of the Estate  
of Richard T. Hill,

Plaintiff-Petitioner,

vs.

UNITED BROTHERHOOD OF  
CARPENTERS AND JOINERS  
OF AMERICA, LOCAL 25,  
et al.,

Defendants-Respondents.

---

ON WRIT OF CERTIORARI TO THE  
CALIFORNIA COURT OF APPEAL  
SECOND APPELLATE DISTRICT,  
DIVISION FIVE

---

PETITION FOR CERTIORARI  
Filed December 5, 1975

CERTIORARI GRANTED  
January 26, 1976

\*\*\*\*\*

[RT 593]

Q. Mr. Hill, on June 13th, 1967, did you

[RT 594] \*

file any \* charges against any business agent?

A. I did. I filed several such.

Q. Now, with respect to the document  
you have in front of you, can you tell me, is that  
a copy of any of the charges that you had filed?

A. This is a copy of the original charge  
that was filed.

Q. Against whom?

A. Against Joseph Wilk, in this instance.  
He was one of the business agents.

Q. What did you charge Joseph Wilk with  
having done to you?

A. I told them that the uniform dispatching  
policy of the L. A. District Council is being  
bypassed by the method of dispatching carpenters  
under steward's requests, according to section  
43 A of the By Laws of the L. A. District Council.

Q. Now, was there a specific person who  
was involved who was dispatched as a steward?

A. Yes. The name was John Capello.

Q. And did you file that complaint with the District Council?

A. I did.

\*\*\*\*\*

[RT 596]

Q. BY MR. HOBART: Mr. Hill, after you had filed your charge about this illegal dispatch that you said occurred on June 12, 1967, did you receive any information as to its processing from the District Council of Carpenters?

A. I did.

Q. What did you receive, or what did you hear?

A. Well, after a period of about a week went by, they sent a letter back by mail, "The executive board has heard these charges and has voted to refuse to process." That's the executive board of the District Council.

Q. I see. Is that the executive board that Mr. McCulloch is the chairman of?

A. He's the chairman. Jimmy Keen also sits on that executive board from Local 25.

Q. Can you tell by those documents, Mr. Hill, as to the date of the dispatch that you complained of, what date that dispatch occurred?

I would suggest it was on 6-12.

A. It says here the event occurred on June 12, 1967. The job was Weymouth & Crowell, Adams and Western.

Q. Do you recall what it was, Mr. Hill, that caused you to believe that was an illegal dispatch?

[RT 597]

A. Well, all the men, myself included, was there waiting for a job, and in order to keep from handing the job out through the window, he decided to run this guy out as a steward, and the men were complaining.

The complaint said, "Received many complaints from members on dispatching, so I checked this one out myself with four witnesses," is what the original longhand complaint reads.

MR. HOBART: Your Honor, for the record, the name of John Capello appears on page 3, line 4 of the out-of-work lists for the week of June 5, 1967.

The following Monday was apparently June 12, 1967, and presumably, the dispatches went out before the June 12, 1967 list was compiled, and Mr. Capello's name does not appear on the June 12 list.



Q. Now, Mr. Hill, yesterday you mentioned that you had attempted for a second time to get a request from that Dinwiddie-Simpson job -- By the way, did you ever work for the Simpson Company before?

A. I did. I built Crocker Bank with them.

Q. Built what?

A. Pardon me, Occidental Towers down there.

Q. That's the William Simpson Company?

A. That's correct; and Dinwiddie, I also worked for.

Q. You had also worked for Dinwiddie?

A. I did.

Q. Now, showing you a copy of the charge sheet that we have already talked about

[RT 598] \*

here as plaintiff's 11, is the \* document which I have now shown you, is that a charge sheet for a complaint against a member of Local 25?

A. Yes, it was.

Q. And who was the person the complaint was made against?

A. E. G. Daley.

Q. And what were the charges made by you against Mr. Daley on June 19, 1967?

A. I charged him with with the violation of section 55 A, paragraph 5, subsection 13, "Specifically going down to the Simpson-Dinwiddie job and talking against the vice president. Specifically describe the offense. I was promised a request order on 6-16-67. This offense occurred on 6-16-67 at the Simpson-Dinwiddie construction site, 6th and Hope."

Q. And did you indicate who should be notified as witnesses in that matter?

A. I did.

Q. What names did you put down on the form?

A. I said, "Please notify Larry Buetner, Foreman." I also listed a Fred Coukos, the general foreman, which the girl in the office, when I filed the charges, scratched out, and she included Ray Wallace on it.

Q. Now, was that complaint ever processed -- strike that.

Did you ever receive any information from the District Council whether the complaint was processed or not -- or accepted or not?

A. I did.

[RT 599]

Q. And what was the result of the District Council of Carpenters?

A. Same as the first letter, "Executive board voted not to process the charges."

\*\*\*\*\*

[RT 617]

Q. Now, Mr. Hill, do you recall at that time whether you were given any special consideration for having returned from the illness rolls by Mr. Daley or Mr. Wilk or Mr. Fenwick at that time?

A. Well, no. They just said, "You have to go out there and sign the bottom of the list, that's all, just like the rest of them."

There had been a practice in that local, whenever a carpenter came off a disability lasting six months like that, they'd get a little preference treatment; but "Put your name on the bottom."

Q. Did you ask anybody for any special preference?

A. I asked Blackie, Ben, and Joe, all three of them.

Q. What did you say?

A. I said, "I've been out of work a long time."

Q. What did you say to Blackie?

A. I said, "Blackie, I've been out of work for a long time. I've got to go back to work,

[RT 618] \*

that's all there is \* to it."

"Get lost, get lost. Sign the list."

Q. Did you go to any other person to try to get a job?

A. I went to Joe and I went to Ben, all three of them.

Q. What did Ben Fenwick say to you?

A. "Well, Blackie's the head man. If Blackie won't give you a job, I can't give you no job."

Q. What did Joe Wilk say to you?

A. He said, "Well, I can't do nothing. That's it, forget it. Blackie's running the show

here."

Q. Did you go to anybody else after they had turned you down?

A. I went over to the District Council, to Gordon McCulloch.

Q. And why would you have gone to Mr. Culloch?

A. Well, it was obvious that either the three of them wasn't going to give me a job, period, and on page 10, after being out of work for six months, that would mean -- in January -- in July I would still be sitting there, and they don't just keep that monkey business going --

Q. Did you go and discuss this matter with Mr. McCulloch?

A. At great length, I did.

Q. Did Mr. McCulloch assign you to a job?

A. He said, "You sit still here, I'll get you a job. You sit still. Of course, I'll have to tell them where I'm sending you.

[RT 619]

He called over there. He said, "I'm going to -- I'm sending Dick Hill down to the Vinnell Corporation."

Q. I'm showing you a pink copy of a referral slip that was handed to you to take to

Vinnell?

A. Yes, that was handed to me by McCulloch, in McCulloch's office.

Q. In looking at that document, do you recognize the signature at the bottom of the work referral?

A. It's signed by McCulloch. I see his name. He signed it.

Q. Do you recognize that as being his signature?

A. Yes. I have an autograph on the party there, the fiftieth party of the carpenters, in which he signed the book for me, and it's compared -- that's his signature.

\*\*\*\*\*

[RT 627]

DANA HOBART,

called as a witness by the plaintiff, having been sworn, testified as follows:

\*\*\*\*\*

DIRECT EXAMINATION

BY MR. HOBART:

Q. Mr. Hobart, in late 1969 or early 1970, did you go to Local 25 to review some of their records pertaining to this case?



[RT 628]

A. Yes, I did.

Q. Can you be more specific as to the date?

A. No, at this time I'm not sure whether the date was in late '69 or early 1970.

Q. Who was present when you went to Local 25 to review certain documents?

A. Benjamin Fenwick, James Keen, Elizabeth Carson; at least those three were present.

Q. On that date did you review documents for the month of March 1968?

A. Yes, I did.

Q. What documents did you review?

A. I dictated into a machine all of the white slips that were available for March of 1968.

I also dictated into the machine all of the requests, or orange slips, that were presented to me at that time.

I also dictated into the machine miscellaneous-type slips which were employer requests.

Q. Has your dictation been recorded in writing?

A. Yes, it has.

Q. Is that with respect to the white slips?

A. Yes, it is.

Q. Is that with respect to the requests?

A. Yes, it is.

Q. Did you dictate the work referrals that were available for that time, for March of 1968?

A. No, I photocopied all of the work

[RT 629] \*

referrals for \* the month of March 1968.

Q. Did you perform a similar inspection, photocopying and listing of the various documents, for other months in 1968?

A. Yes, for all of the months in 1968.

Q. With respect to March of 1968, do you -- strike that.

With respect to March of 1968, is the list of the white slips that you have before you

complete, to the best of your knowledge?

A. To the best of my knowledge, all of the white slips I saw were dictated into the machine, and to the best of my knowledge, my secretary took from that machine, and typed on this white slip that I have in front of me, all of the white slips that existed.

Q. Is the same true with respect to the orange, or request slips?

A. Yes, the same is true with respect to them.

Q. With respect to the date of March 7, 1968, was there a white slip from the Ruane Corporation, or referring to the Ruane Corporation?

THE COURT: How did you spell that?

MR. HOBART: R-u-a-n-e.

Q. What did the white slip state, or request, pursuant to its order?

A. The Ruane Corporation requests three form high, are the words that I have.

Q. Did you observe if there was any  
[RT 630]\*  
request, any \* orange request, or any

miscellaneous-type request from the Ruane Corporation for that job of March 7, 1968?

A. In my list of requests, which total somewhere near 75, I would guess, the Ruane Corporation made no request for any employee for March 7, 1968.

Mr record indicates that the Ruane Corporation made a request on March 22, 1968 for a Mr. Kaeser, or something of that nature; but there was no request from the Ruane Corporation for early March, or anywhere near the period of March 7, 1968.

\*\*\*\*\*

RICHARD T. HILL,

the plaintiff herein, recalled as a witness in his own behalf, having been sworn, resumed the stand and testified further as follows:

DIRECT EXAMINATION (Resumed)

BY MR. HOBART:

Q. Mr. Hill, I'm showing you a yellow copy of a work referral to the Ruane job dated March 7, 1968.

A. That's correct.

Q. At that time you were on page 3, line 1; is that correct?

[RT 631]

A. That's correct.

Q. Now, Mr. Hill, I'm showing you photocopies of two other work referrals to the Ruane job, dated March 7, 1968 -- By the way, Mr. Hill, what is the number on your dispatch?

A. It's numbered B8538.

Q. Now, I'll show you a photocopy of work referral B8539 and B8542. B8539 is a dispatch for Mr. W. H. Cook, and B8542 is a dispatch for Art Mascott; is that correct?

A. That's correct.

Q. All right. Now, Mr. Hill, when you were dispatched to that job, did those gentlemen also go to that job?

A. Yes, they did. According to the work referral, they were there.

Q. Well, do you know Mr. Cook?

A. I know him by sight, yes.

Q. And Mr. Mascott?

A. By sight, yes.

Q. And were they both on the job?

A. Oh, yes, they were both on the job working.

MR. HOBART: Now, your Honor, the record should reflect that on the lists of March 4, 1968, Art Mascott appears at page 4, line 19.

The record should also reflect that there is no notation next to Mr. Mascott's name to indicate he received that dispatch, although there is such a notation for Mr. Hill and for others higher on the list.

The record should also reflect, your

[RT 632] \*

Honor, that \* for the sheet of March 4, 1968, unless my cursory -- more than cursory -- examination is in error, the name of W. H. Cook, the second man dispatched, was not on the lists.

Now, your Honor, I would ask that the out-of-work list for March 4, 1968, be received as plaintiff's next in order, and if I may -- I was going to staple the others. I would ask your Honor --

THE COURT: Here's the stapler, if you want it.

MR. HOBART: Oh, thank you.



I would ask that the out-of-work sheets for March 4, 1968 be admitted as plaintiff's next in order, and the three work referrals, the tow photocopies and Mr. Hill's copy --

THE COURT: Just a minute, I'm getting this down. March 4, '68 --

MR. HOBART: Yes, sir.

THE COURT: -- out-of-work sheet, and you want to put that in as 18?

MR. HOBART: Yes, your Honor.

THE COURT: All right. Let me have that, and I will hand it to the clerk. They have been stapled.

MR. HOBART: Those are stapled.

THE COURT: Yes, that's 18.

MR. HOBART: I would next ask your Honor that the three work referrals for this Ruane job, including Mr. Hill's, be marked plaintiff's 19 and admitted into evidence.

THE COURT: They are all signed by Daley, aren't they?

MR. HOBART: Yes, your Honor, all

[RT 633] \*

three of those work \* referrals are signed by E. G. Daley.

THE COURT: All right, they will be 19.

Q. BY MR. HOBART: Mr. Hill, on the reverse side of your copy of the referral sending you out to the Ruane Corporation, there are certain notations.

Can you tell me, first, inasmuch as there are two colors of ink, when each of those notations were made, or how close to the date of the dispatch of March 7, 1968?

A. Well, I can tell you one thing, these notations were probably made the same day, whenever. Just a case of running out of ink of one pen, is what I am afraid of, two different colors of ink; so they were probably made either the same day, or I might have just grabbed another pen out of my overalls. There's two different inks on there.

Q. Mr. Hill, with respect to the second half of the note, it says --

A. It's all in my handwriting.

Q. All right. "Art Mascott, a carpenter dispatched to the same job I was is still

working" --

A. -- "on the job," yes.

Q. -- "on the job."

Was he still working when you were terminated off that job?

A. Oh, yes, yes.

A. All right. When you were terminated from that job, was Mr. Cook still working, if you recall?

There's no notation there. Do you recall, or do you not recall?

[RT 634]

A. I wouldn't be able to swear to it. I knew Art by face. I knew Walter just casually. Art was working close to me, that's why I knew he was there. We was probably both working on the same scaffold as the other when the man came and gave me my check, and he didn't give Art any check; therefore, I knew he was still working.

Q. Mr. Hill, according to the records of the Carpenters Health & Welfare, you worked 35 hours on the Ruane Corporation job. Now, does that match with your own independent recollection of --

A. That sounds about right. Might have it here --

Q. Now, Mr. Hill, to your knowledge -- that is, in other words, something you have seen yourself -- has Art Mascott ever campaigned affirmatively for Mr. Daley? Has he done anything you can say you saw, as far as campaigning for E. G. Daley for office, something of that nature?

MR. GEFFNER: Your Honor, I object. He's asking for conclusions, also.

THE COURT: I think, yes, campaign is a kind of a loose conclusionary word.

Q. BY MR. HOBART: To your knowledge, did you ever see Mr. Art Mascott pass out any material -- campaign literature, that is -- for offices within the union, bearing Mr. Daley's name on it?

MR. GEFFNER: Your Honor, I object. He's leading the witness.

He can testify as to what he saw, if it's relevant, and I can make a proper objection. He's leading.

[RT 635]

MR. HOBART: I'm not leading. I asked him if he ever saw anything.

THE COURT: Well, I guess he can ask him if he ever saw him with "Vote for Daley" leaflets.

Q. BY MR. HOBART: Did you, Mr. Hill?

A. Well, your Honor, this man was a favorite of Blackie Daley's, and I did see him passing out stuff around the hall, on the sidewalk outside the hall.

MR. GEFFNER: Your Honor, I move to strike the portion that "He's a favorite."

THE COURT: All right, that may go out.

MR. HOBART: Your Honor, again we have here the Health & Welfare records, pursuant to subpoena, for Mr. Art Mascott, and with respect to -- well, if I can get a scissor, maybe that would help me here.

These are photocopies, your Honor, with several -- or two people on the same page, and I am just eliminating those that are not Mr. Mascott's.

THE COURT: What dates are they?

MR. HOBART: Yes, your Honor. These cover his work period from January 1967 through April of 1969; and again, your Honor, we have stipulated to the foundational showing on these documents.

THE COURT: All right, the Mascott records H & W --

MR. HOBART: Yes, your Honor, I'd offer them next.

THE COURT: -- Health & Welfare Trust will be received as 20.

MR. HOBART: Thank you, your Honor.

[RT 636]

Your Honor, I'd like the record to reflect that Mr. Mascott's Health & Welfare records indicate that he worked on the Ruane Corporation job starting -- it does not give the exact date in March. I think we have already shown that -- in March, April, and May, and in the month of March he worked 123 hours; the month of April he worked 136 hours; the month of May he worked 184 hours.

Q. Mr. Hill, after you worked your 35 hours, did you have to go to the bottom of the list again, or were you able to get some place else on that list?

A. No, I was probably right back at the bottom of the list. If you work 16 hours, you've gotta go to the bottom of the list.

\*\*\*\*\*

[RT 638]



Q. Mr. Hill, do you have a recollection as to whether you refused -- or do you recall the job that that's referring to? There's something that looks like it might be R. J. Daum. I can't be positive about that.

A. I'm not familiar with the contractor, but the steel form I recall, yes.

Q. Now, the steel-form job, when it says "Refused steel form," do you pertain to the same type of work you testified to yesterday?

A. Exactly.

Q. Steel form being the heavy pans, and so forth?

A. That's right.

Q. From the time you turned down the steel-form job in March of 1967 -- that was the one where the incident with the Department of Employment occurred, wasn't it?

[RT 639]

A. That's correct.

Q. From the time you turned down that March of 1967 steel-form job, up to this date in April of 1968, had you advised these business agents that you were now competent and able to do steel form?

A. No, they know that. They knew that, sure.

Q. Listen to my question.

A. I had advised them, yes.

Q. That you could do steel form?

A. That I could not do that.

Q. You told them that in March, didn't you? You told them that in March of 1967?

A. That's correct.

Q. All right. Now, from March 1967 to April of 1968, did you ever tell them anything different?

A. No.

Q. Did you ever tell them that you could or would take steel-form work?

A. No.

Q. Now, Mr. Hill, you refused that job, according to that notation. Is that what you did do? Did you refuse the steel-form job?

A. That's what he's got noted in the book there. I don't know what happened. I don't even recall the job, but that's what he's got noted.

Q. Mr. Hill, it has a stamp there. It has the stamp of Thursday; is that right?

A. That's right.

[RT 640]

Q. Now, on that, was the policy -- how many jobs, as you understand the policy, and as you understood the rules and regulations, how many jobs could a man turn down before he was knocked off that list to the bottom of the list?

A. Well, under the uniform dispatching policy set up by the District Council, it says an unemployed carpenter may refuse two offers of suitable employment, plus either be working 16 hours, to be dropped to the back of the list. The question is, what constitutes suitable employment.

Q. In your mind --

A. Steel form wasn't suitable employment. I wasn't registered, wasn't qualified.

Q. At any rate, were you offered any other job besides the steel-form job?

A. Not that I recall.

Q. Now, Mr. Hill, when you came back, when you signed the list on April 15th -- that would be the following week -- can you tell us on the April 15, 1968 sheet what page and what

line your name appears on now?

A. Well, my name appears on page 9, and the fifth -- or the fourth name down from the top.

Q. What does it say? What did you write next to your name?

A. And it says with my name, and I signed the book under protest.

Q. You wrote the words "Under protest"?

A. Yes, in parentheses.

Q. Mr. Hill, the previous week, April 8,

[RT 641] \*

you were on page 4. On April 15th, you are on page 9. Do you have any estimate of time, Mr. Hill, how many weeks it takes you to move from page 9 up to page 4?

A. I wouldn't know that offhand. I wouldn't know.

Q. All right, let's --

A. Three or four weeks, I guess.

Q. Mr. Hill, on the week of March 18, 1968, you were on page 9, as you have already testified --

A. I see.

Q. -- is that right?

A. Yes.

Q. Now, in the week of March 25th you are on page 7, as you have testified; on the week of April 1st you are on page 5, I think -- yes, page 5.

THE COURT: Then on the 8th he's on page 4, I've got.

Q. BY MR. HOBART: So it took you four weeks to go from page 9 to page 4, and now you were back on page 9 again?

A. That sounds about right. Sounds about right.

Q. All right.

Now, on the week of April 22 you were on page 5. I assume there must not have been very many people out of work.

A. Would you like me to explain the "Under protest"?

Q. Yes, tell us why you did that.

A. Number one, I complained that the then-incumbent, E. G. Daley, that he had no right to drop me off the list, since I only had

job. You can't be put to the back of the list for refusing one job offer.

[RT 642]

And number two, I told him I didn't consider it was suitable employment; and I told him, further, I was going to do it.

I go up looking for a job, and there's a big red mark scratch through your name, and he says, "You're on the back of the list."

Q. What did he say to you when you told him you were going to sign under protest?

A. That was done at the rollcall in the day room. He could care less. "Sign it, I don't care if you ever go to work." He could care less.

Q. Now, going on, then, to the following week of April 22, 1968, on April 22 you appear on page 5, line 14; is that correct?

A. That's correct.

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[RT 644]

Q. Did you, at the time of your dispatch make a notation concerning your dispatch on May 1, 1968?

A. I did.



Q. And is that the white piece of paper that you now have in front of you?

A. It is.

Q. All right. Would you tell the court

[RT 645] \*

where you were \* dispatched -- first tell the court under what dispatch number, what referral number, you were dispatched.

A. I was given referral No. D2118.

Q. And the date of that dispatch?

A. Was 5/1/68.

Q. And where were you dispatched to; to what job?

A. 1030 North Alpine Street. That was the --

Q. The name of the employer was who?

A. The William Burke job.

Q. Okay. 1030 Alpine Street?

A. Yes, sir.

Q. Did you take that dispatch when they gave it to you?

A. I did.

Q. And where did you go for your work referral slip?

A. I went out to the jobsite, superintendent's office, first. We're supposed to check in with the timekeeper.

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Q. When you got there, was there a job available there for you?

A. Was no job available, period.

Q. Did you talk to the superintendent?

A. I talked to the superintendent.

[RT 646]

Q. And what did you do immediately thereafter?

A. I approached the job steward on the job. When you come out there with a work order, you're supposed to approach the job steward. Otherwise, they can say you didn't report to the job, if the job wasn't -- in other words, like you didn't even go to the job. So he didn't know anything about it.

Q. Did you make any notation what his name was?

A. I don't have it noted down. The work orders will show it -- oh, Bennett Guthrie. That was his name, right there.

Q. And that was part of that notation you made?

A. Yes.

Q. By the way, when did you make that notation?

A. The same day there.

Q. Now, after talking to Mr. Guthrie and the superintendent, you learned that you had been dispatched, what, to a nonexistent job?

A. He didn't call for any men. If there was any job there, the order was full, because the order was null and void.

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[RT 651]

Q. Now, Mr. Hill, had you been offered this DeCinces job on May 1, 1968?

A. Had I been offered it?

Q. Yes.

A. No.

MR. HOBART: Now, your Honor, I would ask that plaintiff's 21 for identification be

admitted into evidence.

MR. GEFFNER: May we approach the bench on this?

THE COURT: All right.

(The following proceedings were had at the bench:)

MR. GEFFNER: Your Honor, I object on the grounds of relevancy. There's no tie-in of any act of discrimination against Mr. Hill. There's no showing that all of the records are complete. In fact, the testimony is just to the contrary, the records are actually incomplete; and just simply because -- and whether a carpenter was sent out to a job, and there's no request that appears on the records that are

[RT 652] \*

available,\* does not establish, or tend to establish any proof regarding Mr. Hill.

Again, we are going to the area of the hiring hall procedures, dispatching procedures, which if we get into any more detail than we are doing -- and I can't hardly keep from emphasizing, but I want the record clear -- this is not for the jury to judge dispatching procedures.

MR. HOBART: Your Honor, first off, we are hardly going into dispatching procedures in great depth. We have not done that. We have

only stuck as it relates to Mr. Hill directly.

The point of this is, there has been testimony by Mr. Scott that it is and has been the policy of this union to offer men their choice of available jobs. Mr. Hill was given a job that did not exist, that took him out of the hiring hall, caused him delay and other troubles, which we will get into later; but under their own testimony he should have been offered all available jobs, which means this job that Mr. Rodenfels got should have been offered to him so he could take his choice of jobs.

Mr. Rodenfels was behind Mr. Hill on the list, and obviously, by failing to do what they said the policy was, it was an act of discrimination against him.

I would assume it's presumable that these men knew they were sending him out to a job that did not exist for him, and he had to come right back to the hall.

Now, with respect to an additional point, when he says these records are incomplete, I hereby assert to this court that I will make an

[RT 653] \*

offer of proof by reading from the \* deposition of Fenwick, who when I got out to that hall we took his deposition as I went through those records, and he testified in that deposition that all --

THE COURT: By defendant you mean who?

MR. HOBART: Defendant Fenwick. He testified that all of the requests for 1968 were there, and available for me to look at; and I did look at them all and I have already introduced into evidence my own testimony that I examined well over a hundred of them, and there was no such request for Mr. Rodenfels; and if there was no such request of Mr. Rodenfels, then it was an act of discrimination in not giving that job to Mr. Hill, instead of sending him out on a goose chase.

THE COURT: Well, I will let it in. That will be 21.

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[RT 654]

MR. HOBART: Your Honor, I will make an offer of proof I think will be accepted, and that is that Mr. Rodenfels' name does not appear on the out-of-work sheets from the time he received that dispatch on May 1 until the date of May 27, 1968.

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[RT 655]

Q. Now, Mr. Hill -- just a minute. Is

[RT 656] \*

this a copy of \* a work referral that you had on May 13, 1968?



A. That's correct.

Q. And tell us the date of the work referral, what job you were sent to -- and apparently there's no signature on it, unless you recall who sent you out.

Just tell us the name of the job he sent you to.

A. I was sent to Weymouth & Crowell.

Q. They sent you to that job?

A. On Figueroa and Adams.

Q. What was the name of the building, or anything you could identify?

A. I remember the job. It was a little remodel with the Auto Club.

Q. It was a remodeling job with the Automobile Club?

A. Yes, just a little -- as a matter of fact, they were putting in the back of the building.

Q. When you went out there did you accept that job or refuse it?

A. I refused the job after talking to the superintendent.

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[RT 657]

Q. Mr. Hill, tell us why, in your mind, you refused that job?

A. It was a very short job, and I needed some steady employment. I had been out of work for a long time. Didn't look like it was over one or two days.

Q. And did you sign again on the out-of-work list for the following week; that is, the week of May 13, 1968, did you sign on page 3?

A. Page 3, that's correct.

Q. At line 12?

A. That's correct.

Q. Now, Mr. Hill, when you signed that sheet, did you have any conversation with Mr. E. G. Daley?

A. Oh, it was to the effect that he was sending me out on these short jobs, and I was registered for class A high-rise jobs. I wasn't actually registered for remodel work.

Q. Did the business agents make any notation on the sheet of May 13, next to your name:

A. Well, he's got down there -- oh, yes,

[RT 658] \*

Speer, Inc.\*, 234 East Avenue 33.

Q. All right. Now, do you see the words "Refused, E. G. D. "?

A. Yes, Daley.

Q. Do you see those initials there, and the words?

A. Yes, sir.

Q. Do you see the words, "Refused, B. F. "?

A. That's Ben Fenwick.

Q. And do you see "Refused Work," with the initials --

A. J. W. ; Wilk.

Q. Joseph Wilk.

Those were all three of the business agents at that time?

A. All the same day.

Q. Had you still signed the book on May 13, 1968 under protest?

A. I did.

Q. All right. Now, do you recall that Speer job? In other words, did you go out on that Speer job, and did you refuse that job?

A. I went out on it. I took a work referral slip. I took the dispatch to him.

Q. You took the dispatch?

A. Yes. I didn't know what kind of a job it was. In other words, I wasn't even too familiar with the neighborhood.

Q. So they gave you the job, and you went to the job?

A. I went to the job.

[RT 659]

As a matter of fact, there was another carpenter went there with me.

Q. All right. Did you get a -- is this the work referral to that job?

A. That's the work referral to that job.

Q. And that's No. D2099?

A. That's correct.

Q. All right.

When you got there, did you observe the nature of the work that was to be done?

A. Yes. It was about -- didn't look like it was two days, about a day and a half, on a little retaining wall, and it was just to run a garage driveway behind the Salvation Army Home for Women over there on East 33rd Street, on the east part of town.

And I had a carpenter with me --

Q. Who was with you?

A. J. Kabat.

Q. Had he also been assigned to that job?

A. He had been dispatched with me the same day, and it was a two-man job, and he said, "Look, I'm not going to take this job."

Q. Did you take the job?

A. I said, "Kabat, I can't do it alone, so if you don't take it, I'll have to go back."

So there wasn't anybody there to report to. There was usually a superintendent or foreman, or something. Wasn't anybody there,

[RT 660] \*

so we both took it back to the dispatcher \* in the hall, explained the situation what was.

Q. You made a notation on it it was "Two days on retaining wall (Refused)"?

A. Yes, day and a half, two days, on a retaining wall.

Q. Well, you didn't say a day and a half, you said two days?

A. Two days.

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[RT 662]

Q. MR. HOBART: Now, Mr. Hill, going to the week of May 20, 1968, do you see your signature on line 20 on page 2?

A. I do.

Q. You see a red line drawn through that, do you not?

A. I do.

Q. And do you see the initials "E. G. D.", with the word "Refused" under it?

A. That's correct.

Q. Do you see initials by J. Wilk, with the word "Refused" after it?



A. That's correct.

Q. All right.

Now, Mr. Hill, were you, on May 20th, offered this particular job? Do you have any recollection of being offered a job at that time?

A. I don't know.

Q. All right. Then, Mr. Hill, the striking of your name off of this list in red pencil does not indicate that you went to work at that time; is that right?

A. That's correct.

Q. And again, as you are not sure,

[RT 663] \*

referring to the \* Health & Welfare Trust Department for Southern California for the month of May 1968, it shows that you worked no hours, doesn't it?

A. I didn't work, that's right.

Q. So you weren't dispatched to some job there, and that's why your name was lined out?

A. That's right.

Q. All right.

Now, Mr. Hill, for the week following May 27, 1968, tell me if you see your name anywhere on the list that week. Look down this sheet, and I will look with you.

A. No, it's not on there.

Q. All right. Now, Mr. Hill, do you recall the incident at all when you were stricken off the list on May 20, 1968? Do you have any recollection of that at all?

A. No, I don't.

Q. Okay. At any rate, the following week, May 27th, you had not signed the list?

A. That's correct.

Q. Were you out of town, or gone, or anything like that?

A. No, I was probably laying home, sick and disgusted.

Q. All right.

Then the following week, June 3, 1968, do you find yourself on the out-of-work lists on page 6, line 21?

A. That's right.

Q. And did you make any notations as to your entry at that time?

[RT 664]

A. "Under protest."

Q. Now, Mr. Hill, did you stay on the out-of-work lists, again, moving your way up to the top?

Do you see your name on the list for July 1, 1968?

A. I do.

Q. What page?

A. That's page 3, about seven names down.

Q. Seventh line?

A. Yes.

Q. Had you made any notation, still, when you had signed?

A. "Under protest."

Q. Now, off the sheets of May 1, -- or July 1, 1968, had you received a dispatch?

A. It shows a dispatch to Progressive Transportation, 3455 Wilshire Boulevard.

Q. And according to the Health & Welfare records, you were dispatched to Progressive Transportation Company in July of 1968; is that correct?

A. That's correct.

Q. All right. Now, Mr. Hill, from the time you signed those sheets on April 8th -- from the time in April, the week of April 8th, when you had refused that steel-form job, did you receive one day of work between April, to your dispatch in July to Progressive Transportation?

A. I don't think so.

I can tell you the reason this here, now. It's fresh in my mind now.

[RT 665]

Q. What was that?

A. This July 1, I don't think Mr. Daley and Mr. Wilk was any longer in office. They were voted out of office in June. I believe that's the reason.

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[RT 666]

Q. When was the first time you had reference to those elections with him, in a

conversation with him, or about him?

A. It was in the year of '67, the early part, because I told him I was going to do my utmost to see that him and Wilk and them other corrupt politicians was thrown clean out of office. I was just going to do what I could.

Q. Did you call Mr. Daley corrupt? Did you tell him that's what he was?

A. I told him he was a big drunken fool, and he was a disgrace to the labor movement. I told him to his face.

Q. What did you tell him you were going to do with reference to his reelection?

A. I said, "Mr. Daley, we're going to spend as much money to take you out of there as it did to put you in there."

Q. On how many different occasions that you talked with him did you have reference to the election of 1968, and what you were going to do? Was that something that occurred commonly, or infrequently, or what?

A. Every time he showed out in the day-room hiring hall, it would be to the effect,

[RT 667] \*

"Boys, I want you to meet your \* new leader," and he would stagger around, trying to embarrass

me in front of the membership.

Q. Who was he referring to as the new leader?

A. Me. I wasn't running for no business representative. He was talking about me.

Q. Was this as candidate for president, or before that?

A. When I was candidate for president.

Q. Do you recall any specific events, conversations, where you and Mr. Daley discussed the coming election, what you intended to do?

A. Oh, I told him -- you know, I told him, I said, "Blackie," I said, "you know, you're not doing right. You're discriminating against me. You're not running the hiring hall right. You promised you were going to go right, and straighten this thing up when you got in the office. That's why the chap was no longer in the office," and I said, "By God, you're no better than him."

And I even went over to Mr. McCulloch and told him the same thing. He said, "Dick, I know what you are telling me is the truth, but I have to support my business agents." And I told Mr. McCulloch, "I don't have to support them."

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[RT 671]

Q. BY MR. HOBART: Now, Mr. Hill, you had taken your case to the National Labor Relations Board concerning that one incident at the Dinwiddie-Simpson job in May; is that correct?

A. That's correct.

Q. Do you recall when it was you filed the charges against the International Brotherhood of Carpenters concerning that act of discrimination?

A. With the International?

Q. When did you file your labor charges?

A. With the National Labor Relations Board?

Q. Yes.

A. In the fall of that year, I believe.

Q. Does the date of October 23 sound correct to you?

A. That's pretty close to it.

THE COURT: That's October 23, 1968?

MR. HOBART: '67, your Honor.

Q. Now, Mr. Hill, do you recall the date that the NLRB hearing examiner made public his findings?

A. That would be -- I believe it was somewhere in January, or the early part of '68.

Q. Does November 12, 1968 sound correct?

A. That's better than a year later, anyway.

Q. You filed it in October, and it was about a year later?

A. About a year later.

Q. November 12, 1968, does that sound correct to you?

[RT 672]

A. Yes.

Q. Did you see a notice or dispatch of some sort that told the Local 25 that it was to publish in a conspicuous place an admission that they had discriminated against you?

A. I have the document right there in the briefcase.

Q. All right. Now, where did you see that document published -- that is, shown -- in the carpenters' hiring hall?

A. Well, it was shown at the financial secretary's window on the glass, which is not any dispatch room in the hiring hall, it's in a little room with the financial secretary.

Q. Did you make any comment about that to any officer of the union?

A. I did, to Jimmy Keen, who was in charge of the window of the financial secretary.

Q. What did you say to him?

A. What did I say to him? I said, "Jimmy, this order by the National Labor Board is supposed to be posted out in the day room, or where the men get their jobs in the dispatch hiring hall, as it states in the order, 'be in a conspicuous place for 60 days.'" I said, "I don't consider this little window in this hallway a conspicuous place," because nobody would go in there. Some of the members mailed their dues in there. Just any number of members that wouldn't even go in there.

Q. And did he place it in a more conspicuous place after you made that request?

A. No, he didn't.

Q. And what did you do next?

[RT 673]

A. Well, then I went on down to the government attorney that was handling the case down there before the National Labor Board, and I had a talk with him, and asked him if that was compliance, as far as he was concerned.

Q. And did you ever see a letter from the National Labor Relations Board to the union concerning where they were supposed to post that document?

A. I did.

Q. Where did you see this letter?

A. On the desk of Mr Domnitz.

Q. D-o-m-n-i-t-z?

A. That's correct.

Q. Did you ever see that letter at the union?

A. Well, I don't see their mail, but it's obvious they got it.

Q. Well, whether it's obvious or not --

A. No.

Q. Did you later see the notice from its position to a more conspicuous location?

A. Yes, it was changed within a period of, oh, a week or two.

Q. Is this a copy of the document that was published, that is, posted out on the union walls in November of 1968?

A. Yes, only it was signed by the president, Everette Trimble; had his signature on it, Everette Trimble. This is a copy of it.

Q. The only difference on this is that the one that was posted in the union had --

[RT 674]

A. It had his signature, yes, Everette Trimble. He signed it on the bottom.

MR. HOBART: All right.

Your Honor, I would ask this document be admitted as plaintiff's next in order.

THE COURT: All right, 25.

Q. BY MR. HOBART: Now, Mr. Hill, did any officer of the union, Local 25 or District Council, did any one of them ever make any comments to you regarding your going to the NLRB, or regarding the fact that the union had to admit that it had discriminated against you?

A. Well, there was two that I can recall.

Q. All right. Who made the first comment?

A. Gordon McCulloch, for one.

Q. About when did that occur, if you can recall the date?

A. At a board meeting when he read the original file. When he first read the original notice, we was at a board meeting.

Q. That would be back in October or November 1967?

A. That's correct.

Q. What did Mr. McCulloch say to you?

A. We were sitting at the board table there. This was a special -- some kind of a meeting. I don't recall what it was; but, however, he was there, and I was in my vice president's chair, and he said, "Brother Hill, I got a piece of paper I want you to see." And I never got up from the vice president's chair, because he wasn't a member of our board.

So he walks over to the vice president's chair and handed me the paper, and I took the paper and looked at it, and it was a copy of the original charge with the National Labor Board, and I said, "Well, I knew that, Mr. McCulloch. I have already seen it."



Q. Did he say anything to you at that time; anything more than that?

A. When the board meeting broke up he said, "Dick Hill, I'll beat your goddamn ass any way you go."

Q. You said there were two references. When was the second one?

A. The second reference was about 30 days or so later. An agent from the District Council came over -- I believe it was a roll, because Russell Auten was the agent, and I believe it was a roll call gathering when there was 250 men meeting, waiting to sign the roll call, if my -- and he got up on the podium, and he said, "I want you brothers to know that there's a brother that ran down to the National Labor Relations Board, and there's no brother that's going to extract money from this union and stay in it."

I thought he was kind of out of line.

Q. That was Mr. Auten?

A. He was McCul' ch's agent.

Q. Who was he?

A. He was a field agent hired for the District Council to help him.

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[RT 1027]

Q BY MR. HOBART: Mr. Hill, you indicated yesterday that you could name other political allies, that is, people who worked diligently for Daley, Fenwick, and/or Wilk, and who had favored treatment. Can you give us the names of a few such people as those?

A I can.

Q All right.

A Tony Fitch, Lou Altman was another --

Q Just go right along. Just do it quickly.

[RT 1028]

A Kenneth Scott, Ben Stahovich, Everet Trimble, John Jirash, Art Dooley, Art Rosales, Quinton Willis, Wayne Nelson, Adolph Lisberg, Ernie Lumas, Marion Chavez, and Rudy Brown.

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[RT 1035]

MR. GEFFNER: That was at 9:50 a.m., approximately.

The last point, I would like at this time to make a motion to strike the testimony of Mr. Hill that answered the question who were the political allies of Mr. Daley who received favored treatment.

I didn't object at the time, because I was going under the assumption there would be some tie-in in terms of specific acts that would relate to Mr. Hill.

Also, the jury has been subject to a lot of objections, and I thought it would be more appropriate to make a motion to strike now.

In looking, I have the suspicion -- Mr. Hobart put it last week about this testimony -- that Mr. Hobart intends to tie in the testimony of Mr. Hill -- which is, of course, a conclusion. Political allies would be a conclusion -- but merely on the fact of how many hours these 15 or so individuals worked during a prescribed period of time, and if that is the tie-in, then I want at this time to make an objection and ask the court to instruct Mr. Hobart not to continue with that line of proof, outside the jury's presence.

If that's all, then we are faced with the situation of trying to show how many hours 1700 members of the local union worked.

[RT 1036]

THE COURT: Well, I had assumed that maybe you were going to show that these were sort of teachers' pets.

MR. HOBART: That's right, your Honor.

THE COURT: Are you going to point that out in the record?

MR. HOBART: Yes, your Honor. These are the teachers' pets, and I might also point out that yesterday Mr. Geffner, taking the issue that Mr. Hill had indicated that Mr. Art Mascott was a political ally, and we did lay a foundation, Mr. Geffner then went to the health and welfare records -- he, not I -- and he introduced it into evidence, Mr. Mascott's, to show how little this teacher's pet worked during the period of time.

Now, he did it, and he's opened the door, which wouldn't otherwise have been opened, but which I think would be no problem, anyway.

But irrespective of that, Mr. Hill has said, now here are the people that are closest to Daley, among the very closest to Daley and Fenwick and Wilk, and to show what his complaints were.

Do you remember he testified that during 1967 he counted numerous illegal dispatches and favored treatment, and Mr. Geffner says, well, name one, and he couldn't name one at the time,

and largely because there's a dearth of official records. We don't have the records that would establish that to the degree that it should be established, so we have to do it in another way, and that's through the health and welfare records.

And I can also represent to the court

[RT 1037]\*

that a\* sizable number of the dispatches for these favored few are illegal dispatches, and I do not intend to go through every dispatch. Mr. Geffner can tackle that if he wishes, but it will only embarrass him if he does.

These people constantly treated him improperly according to the union rules, so for all of these reasons I think it is material to the case, and it also substantiates Mr. Hill's claim at the beginning, that he was critical of these people about the things they were doing.

THE COURT: To get it straightened out on Mascott, Mascott was put in by --

MR. HOBART: The health and welfare records were put in by Mr. Geffner.

THE COURT: What started that?

MR. GEFFNER: Mr. Hobart asked Mr. Hill on a specific job. He testified that he was out and worked at the same time with Mr. Mascott, and Mr. Mascott was campaigning for

Mr. Daley and Mr. Hill was laid off and Mr. Mascott remained on the job. That was the specific incident where Mr. Hill claimed he was somehow discriminated against by, he claims, someone who campaigned.

THE COURT: That's a boomerang.

MR. GEFFNER: I didn't object because he tied it in specifically to himself on a job, and tied it in to the fact that he was able -- he testified that he saw Mr. Mascott campaigning for Mr. Daley on the jobsite. I think that's certainly proper testimony.

I then, on cross-examination, showed

[RT 1038]\*

Mr. Mascott's\* hours over the last couple of years to rebut Mr. Hill's testimony to the fact Mr. Mascott did not have any hours of work. Now, that --

THE COURT: Score one for the local.

MR. GEFFNER: Right.

Now, that's a far different story than merely having Mr. Hill come in, without any tie-in to himself, and say 15 individuals are political allies of Mr. Daley, as a conclusion, and then coming in next and saying these 15 people worked these number of hours, therefore, it follows they were being discriminated against.



That is certainly not proper tie-in at all, because what that means is that we have to come in and show that Mr. Daley had 500 votes, whatever the number may have been, for whoever voted for him, and what hours did all of these different 500 people work, and it's going to go all over the map.

Some have worked a lot, and some have worked very little. That's the nature of the industry, and simply to state a conclusion in saying Mr. X, Joe, Kenny Scott, is a political ally, in the form of a conclusion, and then say Kenny Scott worked and made \$10,000 one year, is absolutely no tie-in at all.

There is no connection with Mr. Hill, and it's going to exactly -- I hate to keep coming back to this, your Honor, but I think it just has to be said over and over again, because what we are doing, Mr. Hobart is not tying in with Mr. Hill, he's putting the whole dispatching procedures on trial; did they improperly run it,

[RT 1039]\*

whether they meet the\* standards of the law, whether they meet the standards of the Master Labor Agreement, and that is an area for the National Labor Relations Board, it is not for the jury to pass judgment on the operation of a hiring hall.

Now, I know your Honor's ruling on this point, and I'm just reemphasizing it because I

think it has to be said on the record, but under the court's ruling, at least up to date, there should be some tie-in with Mr. Hill.

Now, what he testified on direct were specific incidents of individuals. He named Mr. Rodenfels, who he said got preferential treatment, so we rebutted it. I had --

THE COURT: That blew up.

MR. GEFFNER: He mentioned Mr. Mascott, and we rebutted it. Now, if he wants to name specific people that were favored over Mr. Hill, name any specific job, or any length of work, we can then try to respond, and I'm not going to object; but simply to come in and say 15, 20, or 30 carpenters were allies of Mr. Daley is a conclusion, whatever that may mean in terms of allies.

Does that mean you vote for them, does that mean you campaign for them, does that mean you don't like Mr. Hill, any political environment of the local union, then to show what hours these people worked is absolutely meaningless, because then we have to come in and show the work hours of virtually every member of this local union. I think we have a right and an obligation to do that.

MR. HOBART: Your Honor, they are the ones that took that Mascott -- which was in

[RT 1040]\*

evidence, and I'd forgotten --\* that took that Mascott health and welfare, then Mr. Geffner asked Mr. Hill, "And you claim Mr. Mascott was a political favorite or ally of these people?" He said, "Yes."

He said, "May I now read the hours to the jury to show what this political favorite got," and he read them in. Now, Mascott, he read in. had a lot of zeros to show you he hardly worked at all. That's exactly the way that issue came to the jury in the first place. I didn't bring it to them in that manner. I had a specific incident that we were referring to, but he took -- not only did he take Mascott's, but he even took Rodenfels', doing the same thing with Rodenfels, reading his into the evidence. I don't know if he went the whole extent on Rodenfels.

THE COURT: Yes.

MR. GEFFNER: Yes, I did.

MR. HOBART: He went the whole extent on Rodenfels, yet he wanted to show how this political ally received little or no favoritism. Now, that leaves a very distinct impression on the jury, and that impression is, gee whiz, they say these guys were political allies, but it doesn't sound to me like they were.

They have opened the door because they have read both of them in that context, and in addition to that, they stand up and say "Name

one incident, Mr. Hill, where you claim anything illegal went on during these three months of 1967." As I indicated, they don't have the records; but the point is, I do think that there is a reasonable inference to be drawn when you

[RT 1041]\*

show -- for the time we do have the\* records to substantiate illegal treatment. In other words, they are saying, well, see, he can't prove any, because we have destroyed the records.

THE COURT: Well, I think there is no question, you can show illegal treatment of Hill during that period, but I don't think any doors have been opened by the defendant on the Mascott or tne --

MR. GEFFNER: Rodenfels.

THE COURT: -- Rodenfels matter.

I think, however, for you to get into these things, it has to show some favoritism over Hill. That is, some act relating to Hill.

Hill, of course, testified that these men had been sent out on the job with him.

MR. GEFFNER: Yes, they were specific instances, your Honor. I have no objection to that. If they can show --

THE COURT: But I don't think we should go in -- I would permit you, without showing direct relationship to Hill and an incident, to go into all these other 15 or 20 men that Hill has said were teachers' pets.

MR. HOBART: All right, your Honor. I can tie some of them in, and probably the greatest number of them. Their illegal dispatches ran the gamut, and I know most of those had dispatches in 1968, and at least half of them were illegal; so I can tie them in.

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[RT 1042]

MR. GEFFNER: All right.

On the motion to strike those names, I submit, your Honor, that the motion should be granted.

MR. HOBART: Well, your Honor, rather than granting the motion, I think the motion should be denied, but I should be limited in exactly the manner your Honor has stated.

THE COURT: Well, I will deny the motion, but limiting you --

MR. HOBART: I will not violate your Honor's order.

THE COURT: We have these men just as ipse dixit. Hill's ipse dixit they were teachers' pets isn't proof of anything.

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[RT 1048]

Q All right.

Now, Mr. Hill, according to your prior testimony, you had been on the out-of-work sheets from April 8, 1968 -- I'll call them the sheets (at diagram).

Let's start with the Burke job. You were on prior to that, but -- you went out to the Burke job on May 1.

Now, you mentioned that the DeCinces job was not offered to you, but it shouldn't have been, anyway.

Now, according to your testimony, Mr. Hill, you stayed on the unemployment sheets until May 14, when you turned down the two-day retaining wall job. That was the Speer job. Remember that?

Now, on May 1 you have been offered the Burke job, and as I recall your testimony, the next job you were offered was on May 13 or May 14, the Paul Speer job.

Now, Mr. Hill, I have here the work referrals for all of May 1968, up to the 14th of May. I'm going to hand you one for May 1, 1968, and would you just identify that one; who it is for, and where he was sent.



A Well, it's work order No. D 2111, and the date is May 1, '68, Eric E. Torricelli, Local 25, sent to Morley Construction Company, 1642 South Olive Street, signed by Pen Fenwick.

MR. HOBART: Your Honor, may I ask  
[RT 1049]\*  
that this be admitted\* as plaintiff's next in order.

THE COURT: All right, that will be 37.

The Torricelli is the member preferred?

MR. HOBART: Right.

THE COURT: 1642 South Olive, requested by what?

MR. HOBART: I think it says requested by phone, your Honor.

THE COURT: I see. All right, that will be 37.

MR. HOBART: Your Honor, may I -- well, I'll go around.

Your Honor, may I ask that plaintiff's 37 be passed to the jury. This is the one that says "Req by ph," which I assume means request by phone.

May I pass that to the jury, your Honor?

THE COURT: Very well.

Q BY MR. HOBART: Now, Mr. Hill, up to the 13th of May I had counted out 105 dispatches, plus the two or three we've got in evidence already for May 1.

Now, of these 105 dispatches, Mr. Hill, some of which are various companies -- in fact, all of them are varying companies -- aside from the offer of work on the Burke job which didn't exist, and aside from the offer of work on the Speer job, which existed, but for two days, had you been offered any other dispatch during this period of May 1 to May 14?

A No, I wasn't.

MR. HOBART: Your Honor, in a rubber band I have these -- and I've got my notation on a little piece of paper -- 105 dispatches. It could be off one or two, I counted them hastily;

[RT 1050]

but I ask that collectively they be admitted as plaintiff's next in order.

THE COURT: All right, en masse, 38.

Q BY MR. HOBART: Now, Mr. Hill, some of those dispatches were on the DeCinces job, and you wouldn't have been available for that, anyway; is that right?

A That's right.

Q And I think some of them were requests. At least, it's indicated as requests.

But if it was a valid request, you wouldn't have a right to that job, either, would you?

A That's correct.

Q Now, with respect to the date of May 14, 1968, that was the day you were offered the Speer job. There are several dispatches that I found for that day.

THE COURT: Is that a single day, May 14th?

MR. HOBART: Yes, your Honor.

Q Mr. Hill, could you quickly leaf through those and see if any of those jobs, aside from the ones where there's a request, see if any of those jobs you are familiar with as to the type of work any of them are?

A There was obviously some class A concrete form work included in there.

Q Which ones do you --

A I would suggest this one here for Coy Atkins at 52nd and Hoover. That sounds like a school down there under construction.

Q Okay.

[RT 1051]

A I imagine they called it the 52nd Street School, I wouldn't know.

Some of these requests I don't know; some I recognize as framing jobs. Ernie Hahn is a contractor who builds shopping centers, and he specializes in commercial framing for shopping centers; Ceco Corporation, of course, is another steelform contractor.

Q Well, you were offered a steelform?

A I say that would be -- oh, no, this is apparently a request for something for Joe Wilk for four guys from another local; from different locals.

Q Okay. If you had been offered the steelform job --

A I probably would have turned it down.

There's several dispatches for 52nd and Hoover, Coy Atkins.

A Had you been offered any of those?

A No.

Q Do you know what this dispatch to B. Stahovich, this Willens & Bertisch --

A That's another class A contractor. They got an address on there, College and Figueroa Terrace.

Q You don't know offhand what that was?

A Well, it would be a concrete building. It could have been -- seems to me like it's over in the Chinatown area there, as I recall the location.

MR. GEFFNER: Your Honor, may we approach the bench, please?

THE COURT: All right. Do you want the reporter?

[RT 1052]

MR. GEFFNER: Yes.

(The following proceedings were had at the bench:)

MR. GEFFNER: Your Honor, I want to object to the line of questioning -- I've not objected over a series of questions, to see what it would aid -- in the absence of any specific testimony as to where Mr. Hill was discriminated against regarding his position on the out-of-work list, or where he was requested and not sent out, or any specifics.

Mr. Hill seems to be rambling through a lot of incomplete records -- which seem to be incomplete -- rambling on about whether he's not sure that this kind of a job, that kind of a job.

It's actually meaningless testimony, your Honor, and it is becoming prejudicial to the defendant, having to sit here and listen to this.

THE COURT: I think you were trying to direct Mr. Hill. I guess what you were trying to direct him to was Mr. Stahovich.

MR. HOBART: Well, no, your Honor. It's not just that.

Your Honor will recall we had mentioned the fact he had not been offered the DeCinces job, and your Honor so rightfully pointed out in chambers we ended up with egg on our face on that. Now what I am attempting to do, there were about 120 dispatches during this period of time, and he was offered none of them except these two jobs.

THE COURT: Well, he can look through, but to have him rambling on as he is now, I think

[RT 1053]\*

it is self-defeating from\* your standpoint.

MR. HOBART: I agree. I will keep it more limited.



THE COURT: All right, we will see.

(The following proceedings were had in open court:)

Q BY MR. HOBART: Mr. Hill, regarding those jobs of May 14th -- or April 14th -- strike that. That's May 14th, isn't it?

THE COURT: May 14th, '68.

Q BY MR. HOBART: Regarding those dispatches of May 14, 1968, were you offered your choice of any of them when you were offered the Speer job on the 14th?

A No, I didn't even know those jobs were available.

THE COURT: And all together, there were 13 dispatches there?

MR. HOBART: Let me count them, your Honor.

There are 12 here, your Honor, and one of them has a work request attached to it for that date.

THE COURT: Very well.

MR. HOBART: And I would ask that these be accepted as plaintiff's next.

THE COURT: All right, the 13 dispatches will be received as a bulk exhibit numbered 39.

Q BY MR. HOBART: Mr. Hill, with reference to that one dispatch that you were talking about on the 14th, this Willens & Bertisch job to Mr. B. Stahovich, is this Mr. Stahovich the same Mr. Stahovich which you indicated was a political ally of Mr. Daley's and Wilk's and Fenwick's?

[RT 1054]

A That's correct.

MR. HOBART: Your Honor, I have the health and welfare records for Mr. Stahovich showing that dispatch in May to Willens & Bertisch, and I would ask that it be admitted as plaintiff's next in evidence.

THE COURT: Well, what does it show?

MR. HOBART: It shows that --

THE COURT: Just read the substance of it.

MR. HOBART: Yes. It shows that on that job Mr. Stahovich received 24 hours in May, 144 hours in June, and 146 hours in July.

And I would ask that be marked plaintiff's next in order.

THE COURT: All right, those are the health and welfare records.

MR. HOBART: Yes, for Mr. Stahovich.

MR. GEFFNER: Your Honor, may we approach the bench again?

THE COURT: All right. Do you want the reporter?

MR. GEFFNER: Yes.

THE COURT: All right.

(The following proceedings were had at the bench:)

MR. GEFFNER: Your Honor, this is exactly what I was pointing out in the chambers. There is no showing Mr. Stahovich received a preference, that he was not entitled to be dispatched to that job.

THE COURT: Well, I think Mr. Hobart

[RT 1055]\*

can bring out that\* evidence.

MR. GEFFNER: He's simply saying Mr. Stahovich was sent to the job, Mr. Hill was not. Now, we can do that with all the members.

MR. HOBART: Your Honor, Mr. Hill testified that in his opinion that was the type of work he was registered for, concrete forms. Obviously, it is in preference to Mr. Hill.

It was the policy of the union to offer the man that was available. Now, Mr. Hill ended up on a two-day job, Mr. Stahovich, political ally, ends up on a two-month job. There's a big difference, and I think it is entirely relevant in exactly the same manner as Mascott was relevant, to show this type of activity. That should have been offered to Mr. Hill.

THE COURT: Why should it have been?

MR. HOBART: Because the union policy is when a man is qualified to do the work, he's offered the available jobs they have at that time. Now, I think Mr. Hill has testified as to what --

THE COURT: Well, how do we know Mr. Stahovich isn't also qualified?

MR. HOBART: Mr. Stahovich is not ahead of Mr. Hill on that list, and that's my next point.

THE COURT: All right. If that's connected, I will deny the motion.

MR. GEFFNER: Your Honor, there is no showing he was sent out as a steward, which he was.

MR. HOBART: Well, that's for the

[RT 1056]\*

defense to explain.\* After all, I don't have to prove their case, if there's some extenuating circumstance.

THE COURT: All right.

(The following proceedings were had in open court:)

THE COURT: Well, I think you would do well to go into the exceptions first.

MR. HOBART: Do what, your Honor?

THE COURT: The exceptions; that is, the exception to the rule that makes one workman a proper assignment, and another one an improper assignment, and we ought to have that first before we go into burdening the jury on how many hours they worked thereafter.

MR. HOBART: All right, I will do it in that manner.

THE COURT: Yes.

MR. HOBART: I will follow that up now, as the court has indicated --

THE COURT: Well, we've got poor Mrs. Richardson standing up here. Let's give her a

surcease of words so she can get back to her seat.

MR. HOBART: Your Honor, the out-of-work sheets for May 13, 1968, which have been previously admitted into evidence as plaintiff's exhibit No. 26, indicate that Mr. Hill, on the May 13th sheets, was on page 3 at line 12.

I can represent to the court that Mr. Stahovich is not on those sheets at all on that date, and consequently, was obviously behind Mr. Hill.

Mr. Hill, with respect to that Speer

[RT 1057]\*

dispatch,\* the record indicates that you had refused that dispatch, and then you were dropped to the bottom of the list at that point. Do you recall that?

A That's correct.

Q Now, I'd like to show you a dispatch on the same day to Mr. Andrew Ressel.

Can you tell us, first, the date of that dispatch?

A It's 5-14-68.

Q And where was he dispatched to?

A Paul W. Speer, 234 East Avenue 33.



Q All right. Now, that's the same job that you and Mr. Kabat had been dispatched to?

A That's correct.

Q And when you refused that job you were dropped from the list; is that correct?

A That's correct, if that's what the record shows.

MR. HOBART: Your Honor, I have, again, the sheets for May 13, 1968, the sheets from which the May 14 dispatches would be made, and I will represent to the court -- leaving, always, human error in looking over these names, that are sometimes illegible -- that the name of Andrew Ressel does not even appear on the out-of-work sheets; and I would ask, Your Honor, that the work referral to Mr. Ressel be admitted as plaintiff's next in order.

THE COURT: All right, I will admit it, but I don't see how, if Mr. Hill turned down the job, he's hurt by an unqualified man being appointed to the job that he turned down.

[RT 1058]

MR. HOBART: No, your Honor, the point is this, that the job was so minor they gave it to a man who wasn't even on the list; but for Mr. Hill, who turned that little job

down, they dropped him from the list.

THE COURT: I see.

MR. HOBART: I think that's quite significant.

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[RT 1112]

EARL GEORGE DALEY,

called as a witness by the plaintiff under the provisions of section 776 of the Evidence Code, having been sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HOBART:

Q Mr. Daley, if you don't hear my questions for some reason, if I'm speaking too softly, ask me to repeat it and I will do so.

When did you first become associated with Local 25 of the Carpenters' Union?

A I think 1940 or '41.

Q And in what capacity?

[RT 1113]

A A working carpenter.

Q At some subsequent time did you become a candidate for business agent?

A I'm sorry, I didn't hear you.

Q At some subsequent time were you elected to the office as a business agent?

A Yes, sir.

Q And when was that?

A I believe it was 1963.

Q All right. And you stayed in that office until how long?

A Until 1968.

Q In a general nature, what were your duties and responsibilities as a business agent during that period of time?

A That is, my responsibilities to the membership?

Q Yes.

A Well, I had certain procedures to follow. The rules were laid down -- not specifically, but usually, I had an obligation to my membership to represent them as best I could and in the best capacity I could.

Q Did one of your responsibilities include the responsibility of maintaining the out-of-work sheets?

A By maintaining --

Q Having them available, and having people sign them on Monday mornings, that sort of thing.

A Whenever it fell to my category, that was one of my responsibilities, yes.

[RT 1114]

Q Sometime it would be some other business agent that would do it?

A Yes.

Q And sometimes you would?

A Sometimes myself, yes.

Q Would it be fair to say that it was the responsibility of the business agent to see that the out-of-work sheets and the dispatching process was operated fairly?

A To the best of my ability, yes.

Q What was the procedure for signing the out-of-work list, Mr. Daley?

A Well, the procedure for signing it, I don't -- anybody could sign the book at any time. The book was available to the general public.

Q What was the procedure on Monday morning?

A Monday morning there was a new roll call; there was a roll call of available carpenters.

Q And where would you, if you were conducting the roll call, where would you sit during that roll call?

A I would be on the podium, a little bit raised from the floor.

Q And would the blank pages be on something just below you?

A On a sort of diadem, right in from there.

Q Something like you have right here?

A Yes, something like this, yes.

Q In other words, you are on that side, and the carpenter comes up and signs his name on this side?

[RT 1115]

A Not really that close. Probably be sitting over here, but the thing would be in that general idea, yes.

Q And you could see whoever would be signing?

A I would see who was signing it, yes.

Q I guess you had to call his name out; is that the idea?

A Yes, sir.

Q Would you go through the old list, omitting those people who had been dispatched, and call out the list as it was in order?

A Yes.

Q And if those people were there, then they would come up and sign presumably in the same order they had signed before, with the exception of those men who had been dispatched?

A Yes, sir.

Q Now, with respect to the dispatch procedures, am I correct in assuming that you were governed by the District Council dispatch rules that was published in a little brown leaf sort of thing, a cardboard sort of thing?

A I was governed by them, yes.

Q And that told you the method that dispatches had to be followed in order to comply with the collective bargaining agreement?

A Yes.



Q Now, if a man was number one on the list, and if he has forms, we will say, checked, and you get an order for a forms man, we will say with some company, Turner-McKee,

[RT 1116]

would it be your obligation to dispatch that first man to the Turner-McKee job?

A Whatever job is called in, if it was a forms job, and he was marked forms, I was obligated to call this gentleman for the job.

Q All right. And so if the Turner-McKee job called for ten forms men, then under the rules of procedure, you would take the first ten men, assuming they were there and available to go out to work?

A I would call the roll call off the list. I would call it off the list.

Q Would there be any authority for you to call, say, five or seven of them, then pick the last three from somewhere down on the bottom of the list?

A No, not that I know of.

Q In other words, you have to follow the list, and give priority to the man who's been waiting the longest?

A Generally.

Q Now, with respect to the issue of qualifications, on the sheet a man puts a check wherever he wants to put it; isn't that right?

A He classifies himself.

Q Right. So if he classifies himself as a forms man, you don't have the option of saying, "Well, you're not a forms man, you are a framing man, and I'm not going to send you out on forms"?

A I had no way of qualifying any man.

Q Each member has the right to qualify himself?

[RT 1117]

A That's right, sir.

Q And if a job came up where a forms man was required, or requested, and we'll say carpenter X was first in line, but for some reason or another you didn't think he would be the right man for that job, but he did think he was the right man for that job, it would be your obligation to send him, anyway?

A I had no business qualifying, or saying he was qualified or not qualified. He qualified himself.

Q So my point is, the answer is yes --

A I don't get the question, as far as "The answer is yes." Would you repeat it?

Q Surely.

The man who marks himself down as qualified for forms, we'll say a journeyman carpenter, even though you personally may not think that he could do the work on that job, but you personally would not have the authority to refuse to dispatch him just because you didn't think he could do the work?

A I had no authority. I had to dispatch him.

Q Right. If trouble came on the job, he could be fired by the supervisor or foreman, or something?

A That's where it usually came to a head, yes.

Q But it was not within your province to tell a man, "I can't send you out because I don't think you can do the work"?

A Oh, no.

Q Now, what was the general

[RT 1118]\*

procedure for obtaining\* work orders from the employer contractor?

A By procedure, you mean how we acquired the work orders, or --

Q Yes. How did you get the information that, we will say, Turner-McKee wants ten forms men tomorrow?

A Many ways.

Q Tell us.

A Sometimes a contractor came in himself, or sometimes he sent a representative in, or they would use the telephone or letter. There was many ways.

Q All right. Is one of those ways the most common way?

A Out of all of them, what is the most common way?

Q Yes.

A Usually, telephone.

Q And when you'd get the telephone order, you'd write it down on what's been called a white slip?

A I very seldom got the orders.

Q I see. You personally didn't take them; sometimes it would be Evelyn Folick, or somebody in the office?

A Secretary in the office. She was the only one authorized to take the order.

Q But when we talk about white slips, we are talking, basically, about the type of document I'm showing you here?

A Correct, that's -- oh, I beg your pardon. Could I see that again?

Q Surely.

[RT 1119]

A Yes, this is the general idea of what we call the white slip, where the secretary took the information down, and then left it available to the business representative, whoever came in in the morning.

Q I see. So you would get the white slip handed to you sometime in the morning if you were on dispatch?

A Generally.

Q Sometimes you'd rotate the dispatching, you say?

A Whoever was there took these. There was no procedure on whose turn it was, or anything like that.

Q Sometimes two or three of you were doing dispatching on the same day?

A No, that would create confusion.

Q Sometimes two on the same morning?

A Well, the only way two would be doing it is if one of them wanted to be relieved.

Q I see. But occasionally, there would be dispatching done by two people?

A I really -- I really don't know whether two done it or not. If I was dispatching why, I done it solely by myself.

Q Well, I have to pass that for now.

Mr. Daley, if I represented to you, without actually taking the time to get out the documents, if I represented to you on February 19, 1968, Mr. Joe Straveris was dispatched to Fellows by Mr. Wilk, and on the same day Mr. James Abel was dispatched to Sette Noonan, N-o-o-n-a-n, by you, would you say that that

[RT 1120]\*

refreshes your memory, and\* that occasionally two people are making dispatches on the same day?

A I cannot recall specifically this, or any one of these. This is quite a while ago, but this is possible.



Q Very well.

A This is possible.

Q In other words, it is possible that on some occasions, more than one person was dispatching?

A Well, not at a time; not at one time.

Q Oh.

A In other words, this could have happened after dispatching was all over, a late call in.

Q All right.

If I represented to you on February 29, 1968, Joe Straveris was dispatched to Oltmans Construction by Wilk, and on the same date that you dispatched somebody by the name of Vito Marinaccio to Steed Brothers, and on the same day Roscoe Franklin was dispatched to Barrett by Mr. Fenwick, would it be a fair statement to say that occasionally, although it was not the practice, the dispatches were made by more than one person on a given day?

A Oh, yes. In the way you put it, yes.

Q And that occasionally some of those would be morning dispatches?

A Well, they had to be morning dispatches.

Q Now, if a man works 15 hours, he is allowed to resume his place on the out-of-work lists; is that correct?

A That was the procedure.

[RT 1121]

Q And if he worked 16 hours, two full days, then he had to go to the bottom of the list?

A That was supposed to be the way it was, yes.

Q Now, if the man was dispatched to a job that lasted less than 16 hours, you would write "Pickup" in the sheets when he took his place back on the line?

A If he came there and showed that he got less than the 16-hour period in, then to show the procedure -- I mean, give the dispatcher a chance to pick him up to send him out on another job, yes, sometimes it was written as "Pickup."

Q Well, the word "pickup" had to be written there so that somebody who was reviewing the list would know that the man wasn't a sneak-in?

A Not necessarily.

Q No? Why did you write "Pickup" in there?

A Because it was brought to my attention by the individual himself.

Q And so you let him resume his place on the list?

A That was -- I had to.

Q Right. And I'm saying that the point is, that when you did that, the policy was to write the word "Pickup" so that whoever would review this list thereafter would know that this man had worked less than 15 hours?

A No, that wasn't the policy. It wasn't -- all the policy was, that if the man had less than 16 hours and he showed that he had a check stub showing less than 16 hours, he could come to the window, the dispatch window, and secure another job.

[RT 1122]

Q Directing your attention to the out-of-work sheets for February 12, 1968, taking a look at the last name down here, it looks like Leopoldo Hernandez. Somebody's written in the word "Pickup" there, haven't they?

A Yes, definitely.

Q Apparently it's in the same ink as the rest of it, so the word "Pickup" there, in effect, means the guy didn't get his 16 hours, and he has to resume his place?

A He has a right to be given another opportunity.

Q Now, Mr. Daley, if a man is offered a job and he refuses it, you put a date stamp; is that correct?

A That was the procedure.

Q And if, subsequently, during the week some type of work that he was qualified for came in, and he wasn't there to receive that dispatch, he'd get another date stamp?

A True.

Q Now, once you have had these two date stamps, that means that twice you have been available for work -- twice you should have been available for work and you are not working; is that correct?

A Could you rephrase that?

Q Sure.

Once a man got these two date stamps by his name, and assume he has not been dispatched out on one of those date stamps, once he's got those two date stamps, he has, in effect, rejected

two jobs, in effect, although he may not personally --

A       Supposedly.

[RT 1123]

Q       Right. And under the bylaws and rules of dispatching procedure as formulated by the Los Angeles District Council, two such failures to accept suitable employment meant that the man has to be dropped from the top of the list, and he goes to the bottom of the list?

A       That's -- yes, that's right.

Q       Now, isn't it true that on numerous occasions you would mark two date stamps by a man's name, but nevertheless, would not drop him to the bottom of the list?

A       Not that I can recall.

Q       To the best of your knowledge, every time a man had two date stamps you dropped him to the bottom of the list?

A       There was a procedure, and as far as I know, that's the way it was carried out.

Q       That's the way it was supposed to be carried out, wasn't it?

A       Yes, sir.

Q       Well, just to grab one at random, some sheets at random, Mr. Daley, I direct your attention to the date of January 29, 1968, and I see the name on page 1, down about line 17, of Thomas Smith. Do you see that?

A       Yes, sir.

Q       How many date stamps do you see for him?

A       Two.

Q       All right. Now, the next week -- would you like to review it a little longer? Please go ahead.

A       No.

Q       -- two date stamps, one for

[RT 1124]\*

Monday and one for\* Tuesday, then on February 5, according to the rules as you stated them, Mr. Smith should have been dropped; is that right?

A       Should have been.

Q       But we see Mr. Smith has moved up a little bit, he's still there, and we notice on 2-05-68 he's got two date stamps again, Tuesday, and it looks like Thursday.



A True.

Q Now we know he wasn't dropped on two occasions.

Let's see if he was dropped on the next one, 2-12-68.

Mr. Smith got a dispatch from page 1, didn't he?

A I don't see where he did.

Q Well, his name is lined out.

A Well, that's true, because there's two stamps there.

Q All right, let's take a look at the records and see if we can find something for February '68.

What is that name, Mr. Daley. Is that Thomas Smith?

A Thomas C. Smith.

Q Maybe we could do it a little quicker by looking at the next sheet, just to see if he's at the bottom of the sheet.

What would the next sheet be?

A 19.

Q February 19?

A Right.

Q I'll tell you what, my eyes are

[1125]\*

kind of blurry; but you start looking at the back of the list on 2-19, tell me if you see his name, and I'll start going through the dispatch list and see whether he got a job.

A I'll join your class, put my glasses on.

A It helps.

Was his name Thomas Smith?

A You want me to go through this February 19th, all the way through, looking for his name?

Q Sure, see if he's there.

MR. GEFFNER: Can I help you?

THE WITNESS: I can't find it. It's not on there. I don't see it, anyway.

Q BY MR. HOBART: Well, I don't see anything here, Mr. Daley. Did you see anything there?

A No, sir.

MR. GEFFNER: I am double-checking, Mr. Hobart.

MR. HOBART: Okay.

MR. GEFFNER: No.

Q BY MR. HOBART: Now, Mr. Daley, would you agree with me that on the sheet where he has the red line -- which one is that?

A Right here.

Q Okay.

-- that it was the policy to run a red line, or a line through a man's name when he got a dispatch so you'd know next week not to call his name?

A The red line meant exactly that, so you wouldn't call a man's name; but there's

[RT 1126]\*

no evidence that he was\* dispatched here, because there's no job. If you will notice, the job orders are written down here behind the man's name.

Q That's only an occasional thing, isn't it?

A What's that?

Q Where you actually --

A You wrote the name of every job you dispatched a man to. You wrote the name down here.

Q You say whenever you dispatch a man you write the dispatch here?

A The job, where he was dispatched.

Q Oh, I see. Okay, let's just check that.

Was that the procedure that was supposed to be followed?

A Generally.

MR. HOBART: Excuse me, your Honor, just one second. I left some of the records in the car.

Q Now, you say, Mr. Daley, that the policy is to indicate the dispatches on the sheet whenever they are made?

A That was the general policy, yes. It was supposed to have been done that way.

Q All right. So any dispatches from the 3-11-68 sheets -- and if you'd care to use any other sheet as an example, I'd be glad to pick one

you suggest. I don't want you to think I have run in a ringer on you.

A No, go ahead, Mr. Hobart.

Q So the dispatches for 3-11 would start about 3-12, wouldn't they? In other words, 3-11 would have been the old sheet?

[RT 1127]

A 3-11, this would have been Tuesday. The dispatches would start on a Tuesday.

Q Right, because you dispatch on Monday from the old list?

A Right. If this was 3-11, and 11 fell on Monday, then the dispatches start out on Tuesday, which is clearly marked here.

Q All right. Now, I've just got a handful here. I see that Henry Standers was dispatched on 3-12 to -- can you read Mr. Wilk's writing, where he was dispatched to?

A Pretty hard. Some Foster & Kleiser -- well, this is a -- this is something unusual, Foster & Kleiser calling in for a man.

Q Okay, we will say that is not typical.

A No, it's not typical.

Q All right. Turner Construction is typical; right?

A Yes.

Q 3-12, Carlos Salinas to Turner. Let's see if that one is listed on here.

The fact of the matter is, on these sheets, 3-11-68, we only see one, two, three, four dispatches indicated off of those sheets, don't we?

A This is possible, because -- is Carlos Salinas on the list?

Q Well, let's assume he is on the list. I thought you told me it was your policy to line his name out and write the dispatch on the list.

[RT 1128]

A Well, not necessarily. This man could have been requested.

Q Well --

A He's an apprentice.

Q Okay. Well, wouldn't he be on the list?

A No, he wouldn't have to be on the list. He's an apprentice. He can be dispatched anywhere at all.



Q Here's a P. J. Walker. What's his name?

A H. Wolfe.

Q Okay, Howard Wolfe. He's on the lists, and it is indicated; is that right?

A That's right.

Q How about Mr. Ortega to Brown Framing. He was a request, but we don't know if he's on the list, do we? Let's just make it easy and skip those.

A Framing has always been a very easy job; but it's evidently a framing contractor.

Q Okay. Well, let's skip it, anyway, and he may not be on the list.

Okay, here's Mr. W. C. Palmer, and he's on the list and the dispatch is indicated.

A Yes, sir.

Q Okay. How about Lamont Johnson, P. J. Walker Company. He's on the list, and it is indicated, right?

That's a request, request -- okay, 3-13, Cornel Jenkins, steel form. He's not a request, is he?

A Unless -- he could have been sent in. He could have been sent in with a check stub,

[RT 1129]\*

and requested a work\* order, which was given to him.

Q Well, the fact of the matter is, when a man came in and was dispatched as a request, like the one I'm showing you with your signature, you'd write "Request" on it?

A If you had that work order. If that white slip was a request like that, you would. You would write "Request" on it, yes.

Q All right. Now, I don't know whether Mr. Cornel Jenkins is on the list or not --

A But let's take this one here. This one here, Steelform Contractors, would not necessarily ever have a request on it, yet the men were all sent in for a work order.

Q In other words, just an oral request?

A No, no oral requests. These men would come in here -- a foreman would come in and say, "Here, I want these men," and he'd bring their cards in as paid up, to show they were paid up, and as employees of the company. The work orders were written out automatically. You write the work order out for each individual.

Sometimes we'd write a work order out for steel form with a number of men's names on one work order.

Q All right, I think I understand that, but why would it not indicate it on the list? Why wouldn't the dispatch -- you have told us that the dispatches will be written out on the list?

A True, but under these circumstances here, the job was hard to fill. You very seldom could find men that would work on pan jobs.

[RT 1130]

Q What do you mean, "pan"; steel form?

A No, this is the name of a company.

Q Oh, Steelform, for the most part, did steel pans, or worked with steel forms?

A Pans, yes.

Q You couldn't find too many people, so sometimes you'd dip into the bottom of the list?

A You'd dip into anything you could to fill the order. Sometimes it was impossible.

Q I gather -- why would it be impossible to fill a steel form job? It's not that --

A Well, a carpenter qualified himself, and sometimes he didn't like this type of work.

Q Was it kind of heavy, or something?

A Well, it's rather difficult. Might be a little heavy, yes.

Q All right. Well, let's move on and see if we can find another one.

How about Steed Bros.? That's 6th and Hope. That would have been a regular construction, wouldn't it?

A Regular

Q Let's see where Vincent -- what is his name? That's your dispatch, isn't it?

A Vincent De Jong.

Q Yes.

A I think he was a steady employee of them.

Q Well, you'd have to have a request for him?

A No, not necessarily. If he came

[RT 1131]\*

in and requested\* a work order, and he showed that he was an employee with check stubs and he was transferring from one job to another, then it was our -- we'd just have to check out to see he was an employee, by requesting a check stub, so --

Q Well, how do you know if he's a request, Mr. Daley?

A Generally we got a phone call, and said, "I want so and so," or something like that. Or else a man would come in and he'd say, "I'm transferring from one job to another. See, here's my check stub. I work for the company." So we would write the work order out for this man to go from this to that job -- from there to that job.

Q I was under the impression that when he had a request or job transfer you wrote it on here.

A I'd -- when you call them requests, Mr. Hobart, I have had requests written on wooden shingles, 2-by-4's, anything that a man could write on. They would write or send it in. Sometimes it would be written on a little teeny piece of paper that they'd pick off the ground.

Q Well, that's not my question. My question is, is this, then --

A What?

Q -- is it not a fact that when there is a request, you people all wrote the word "Request" on these yellow slips -- I mean, at least half of them?

A This is true, but it's not necessarily infallible.

Q I see. Sometimes you'd forget to write "Request"?

A Yes, sometimes we'd forget.

Q With respect to Vincent De Jong

[RT 1132]\*

with the Steed\* job, do you have any knowledge of whether he was requested for that job?

A I have no idea. My name is on it, but I have no idea.

Q If he was a request, he could have been on a slip of paper, or one of the regular forms?

A It would indicate to me that this here, at 9:00 a.m., would be a request.

Q Okay.



A See, this 9:00 a.m. written on here, evidently by me -- it's there -- would indicate to me that this could possibly be a request.

Q Why wouldn't you write the word "Request" there?

A After a while you try to get, you know -- I mean, you get a little punchy. You don't do everything exactly right. You've got to miss sometimes.

Q Of course, if the workers were behind a fellow on the list, don't know he's a request, that would certainly raise some dissatisfaction in their mind, wouldn't it?

A If you don't believe it, get up there and do it. They'll really tell you.

THE COURT: Mr. Hill has brought those in hopes you will find the mysterious Mr. Smith in those two cases.

MR. GEFNER: We found Mr. Smith.

MR. HOBART: Oh, we did find Mr. Smith?

MR. GEFNER: Yes, on the February 26, '68 out-of-work list.

MR. HOBART: What page?

[RT 1133]

MR. GEFNER: Page 10, line 3.

MR. HOBART: Thank you.

Q Well, Mr. Daley, just to follow up on that, since we have found the elusive Mr. Smith, is there some reason why he wasn't stricken from the list?

A Well, I can't recall any real reason right now. It's quite a while. It could have been several reasons.

Q You don't know that he didn't get a job during that period, do you?

A I wouldn't know now, no, sir.

Q I'm showing you the sheets of January 22, 1968, at page 10 Mr. Al Johnson appears on this page somewhere -- perhaps not. Is Lamont Johnson Al Johnson or Al C. Johnson or neither?

A I wouldn't specifically remember Al Johnson, per se. I might if I saw him, but by name, I couldn't say.

Q Looking at the dispatch for 2-1-68, page 9 on the January 29, '68 sheets, do you see the name H. H. Mitchell there?

A Yes, sir.

Q Now, do you see any dispatch indicated for him on that sheet?

A No.

Q Now, if he was dispatched on that day from page 10 on that list, he should have had his name lined out and the place indicated where he went, shouldn't he have?

A Ordinarily, yes.

Q Well, let's see if he was dispatched that day.

[RT 1134]

All right. Now, you dispatched him on that day to Volume Merchandise; is that right?

A Yes. That's not a contractor.

Q Does it matter?

A Yes, it does.

Q All right, tell us what the difference is.

A Well, the difference is, every once in a while we'd get an order for 20, 40, 50 men by a guy doing a home show, like in the Forum, or any place -- decorators, just like -- decorators, and they couldn't get the job done, so we would ask men who would want to go out there.

But this Volume Merchandise, I don't remember exactly who that was, or anything; but we would dispatch these men to the job, and Volume Merchandise doesn't ring a bell at this time what ~~the~~ were in, but they don't sound like a contractor to me.

Q Well, if a man goes out to work --

A Oh, I seem to recall this, sort of -- yes, this was a contractor.

Q Well, there are three dispatches to that contractor, Mr. Daley?

A Yes.

Q Now, going back to my original question, sometimes when you make a dispatch, the dispatch is not indicated on these sheets?

A Oh, this is very true, Mr. Hobart; very true.

Q Okay, that's all I was trying to show.

Here, let me put those back in here.

[RT 1135]

However, is there any reason that you can think of that you would dispatch a man to that job from page 10? -- and I don't know where the other two dispatches are.

A Yes, there could be a reason.

Now, specifically, you brought Mitchell up here, and he has a work order there. Mr. Mitchell was quite frequently at the hall, or in the vicinity of the hall, all day long. In other words, it was a home away from home, and once in a while we'd get a job like this one, a remodel job downtown where the guy would call up and he would get ahold of a business representative like me, or somebody, and request a man right now, so we'd check the hall and see if there was anybody around available.

Q Well, let's just --

A In other words, we weren't dispatching off the dispatch slip.

Q Well, let's just check something here.

As far as Mr. Mitchell's dispatch is concerned, the number on his dispatch is 10658, isn't it?

A Yes, but that doesn't mean a thing, sir.

Q Well, you will agree that it is 10658?

A Yes, sir.

Q And you will also agree that one of the other dispatches to Volume Merchandise is 10657?

A That's right.

Q The other one is not?

A That's why I say it has no bearing.

Q Well, as far as Mr. Mitchell is concerned?

[RT 1136]

A Yes.

Q Now, a dispatch to Vinnell Company, 10661, on the same day; right?

A True.

Q And we have a dispatch to Vinnell, 10660; right?

A True.

Q And we have a dispatch to Vinnell, 10659?

A True.

Q Now, that gives you some indication that they were probably dispatched right at the same time that morning, doesn't it?



A Generally it would indicate that, yes; but these dispatch orders were kept in a drawer, and they were loose in the drawer, and we reached in and grabbed one.

You didn't follow -- necessarily follow them. They weren't on a spindle, or anything like that. They were loose in the drawer; so you could get one that had no relation to this number.

Q You would agree with me, wouldn't you, that whenever you got two dispatches, 10657, 10658 --

A On the same date.

Q -- on the same date, then I can show you 10659 and 10660, those would be a pretty good indication those were morning dispatches?

A True.

Q And those morning dispatches, at least for H. H. Mitchell -- we haven't checked any further for the rest of them -- but as for

[RT 1137]\*

Mitchell, the dispatch does not indicate\* on the sheet?

A Now, what date were these here?

Q These were on the 1st.

Q The 1st.

A Yes, of February, right.

Q Yes.

A See --

Q That's what I', saying, they were all dispatched at the same time, February 1st, in the morning.

A I couldn't really say that, Mr. Hobart, because these dispatch order numbers are not necessarily indicative of when they were dispatched or written.

Q No, but they are pretty close to accurate, aren't they, Mr. Daley?

A I can't say that, either. I would say they should be accurate, but knowing our procedures up there, we're not too accurate.

THE COURT: By accurate, I guess you gentlemen are talking about serial order?

THE WITNESS: Yes, sir, that's what I mean.

MR. HOBART: Yes, sir.

Q For the most part, your dispatches are in serial order?

A No, sir.

Q For the most part, but some of them are not?

A No.

Q As I said, they keep them in a

[RT 1138]\*

drawer, and they\* were looking in a big drawer, like in a box.

Q When you bought them in the first place --

A They were in a box in rotation.

Q And somebody had them printed up?

A Yes, sir.

Q And they were printed up, and printed in numerical order and stacked in numerical order?

A That's right.

Q And you would take them out of the box they came from the printer in?

A That's right.

Q All right.

THE COURT: Well, perhaps we ought to take our morning recess now and find the other things Mr. Hill brought up in the valise there.

So we will take 10 minutes off, and the jury is given the customary admonition.

(Recess.)

THE COURT: All right.

Q BY MR. HOBART: Mr. Daley, we've got, for the most part, February '68 sheets up here --

A There's one here -- three of them.

Q January 29th would be a good one; February 12th, 19th -- so there should be one more, right? -- well, it wouldn't be on those two. Let me find it.

We want 26. February 26. Here it is, okay.

A Want to put these here?

Q I'll put these over here. I don't

[RT 1139]\*

think we will\* need them right here. We'll get them out of the way.

Now, Mr. Daley, as you probably know -- or maybe you did not know -- I went out to the union some time ago and photocopied all the records that were there available for me to photocopy, of any that were relevant to this case.

I have in front of me employer requests, the actual photocopies of them, for February of 1968, and I have some of the telephone work order, white slip requests, for that period of time; and you, sir, have the February out-of-work sheets in front of you.

Now, starting with the dispatch of Mr. Ted Roth, we already had the dispatch. We talked about the dispatch of Mr. Mitchell from the back of the book -- which one was Mr. Mitchell on? That was on the January 29th sheets.

He's on these sheets here. I'd like to keep a running note of that. Okay.

So as far as Mr. Mitchell is concerned, he was on page 9. Do you find him there?

A Yes.

Q Now, Mr. Mitchell did not have any dispatch indicated after his name, did he?

A No, sir.

Q And that's a violation of the rules -- at least, if it's intentional? I'm not saying it

couldn't have been inadvertent.

A No, it's not a violation.

Q I thought you told us before when you made all the dispatches you indicated them on the work sheets.

[RT 1140]

A That was supposed to be the general practice of the local, but it wasn't the law laid down by the District Council.

Q Okay.

But, at any rate, his dispatch is not indicated, and in all fairness to you, sir, do you have any explanation as to why a man on page 9 was dispatched in front of all the brothers ahead of him? Any particular recollection on that?

A No particular recollection on this particular case, no, although my name is signed to it.

Q Okay. Now, let's mosey along.

Showing you a dispatch for Mr. Ted Roth on February 5, 1968, what is that, Nichols?

A Yes.

Q Nichols Construction, Courthouse Building; right?



A Right.

Q Okay, that's general carpentry work, or general construction work, isn't it?

A No, it is not. It is finish work. You wouldn't call this paneling carpenter work.

Q All right.

If you would take a look at the sheets for the dispatch of the 5th of February, I guess that would be off the January 29th sheets; is that right? You wouldn't go off the February 5th sheets, you'd go off the sheets prior?

A No, you'd go off this here list here.

Q As my wife tells me, I'm subject to many human frailties, but I have reviewed that

[RT 1141]\*

document, and I can't find\* Ted Roth's name on there, anywhere.

Perhaps you'd like to quickly go through it and see if you can find Mr. Ted Roth.

A I am familiar with Mr. Roth.

Q Well, first see if you can find his name on it.

A I don't see it. Usually he's on one or two pages; one or two.

Q Okay. Now, he wasn't dispatched as a request, was he?

A Well, it's not indicated.

Q And if it is finish work, there is a number of fellows on here who have indicated they can do finish work; isn't that true?

A This is the column here used for that, yes.

Q There's quite a few of them?

A Right.

Q And some of them were still unemployed when this dispatch went out to Mr. Roth; is that correct?

A Evidently.

Q Now, do you have any specific recollection that you could direct our attention to as to why Mr. Roth, who wasn't even on the out-of-work sheets, was dispatched to that job ahead of many others on the sheets that can do the same kind of work?

A There could be several explanations which might fit, but which I couldn't vouch for at this time. It's been quite a while, but if I remember right, Ted Roth was a finish carpenter.

[RT 1142]

Q Well, if my reading is correct, Gehring is a finish carpenter, a guy named Stebbins is a finish carpenter, a guy named Jackson is a finish carpenter, a guy named Jacquinet, or something -- I'm reading just those that weren't dispatched -- Jennings is a finish carpenter, Aragon is a finish carpenter; and there are numerous finish carpenters.

For example, there's got to be one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve on page 5 who are finish carpenters, and probably are on each and every page; but at the moment, you don't recall why Mr. Roth was dispatched?

A No, I can't recall why, or the circumstances at all.

Q Now, with respect to Mr. Paul McErlane, he was dispatched on February 5, 1968.

Now, again, in my review of the January 29th sheets, Mr. McErlane does not appear on those sheets at all, and he was dispatched to the J. W. Burke Company, wasn't he?

A That states right there, yes, sir.

Q That's general contracting work, isn't it?

A Yes, very -- it was a long-time job, Department of Water & Power.

Q A pretty good job from a carpenter's point of view?

A Very good.

Q Okay.

Now, offhand, do you know why Mr. McErlane was dispatched to that job when there

[RT 1143]\*

were dozens of carpenters\* ahead of him on the list?

A No, I can't recall any specific reason, except that there was considerable confusion on the job to begin with. The scheduling of the job by the superintendent was rather fouled up, and there was some confusion on the job.

Q Was there some confusion in your office.

A Generally there was some confusion in my office.

Q All right. Was there such confusion that you would say that the reason that this man who wasn't on the list got this good job, was because your office was confused?

A No. No, I wouldn't say that.

Q All right. Well, let's go on to the next one.

You've got the name of a Mr. Juden -- is that his name?

A Got me, I wouldn't recall the name.

Q Okay, N. Juden. He apparently was sent out by Mr. Fenwick; is that right?

A Seems to be Fenwick's name, yes.

Q And it would indicate a request?

A Um-hum.

Q Is that right?

A Yes.

Q Now, if you would be so kind as to review the employer requests that existed for that month, February 1968, of which I represent to you that I copied all of them, and --

A You copied this one, too.

Q No, I didn't see one there. Maybe I overlooked it. You just tell me if it appears

[RT 1144]\*

there. In other words, see if you\* see Crown Construction requesting Juden.

A Well, I'll take your word for it that it's not there, if you say so, Mr. Hobart.

Q I will say it is not there.

A But there is considerable doubt as to whether this request was recorded on paper. It could have been a telephone request.

A I see, okay. So I'll just make a note on the back of this one, that this is possibly a telephone request.

But, at any rate, Mr. Juden, who was, as you say, possibly a telephone request, will you take my word again, Mr. Daley, that he does not appear on the lists for January 29, 1968?

A I'm pretty sure you went over it pretty thoroughly.

Q Well, I surely did, but I am fallible. All right.

And now let's go to the next one. You had a fellow by the name of Juan Flecha -- Flecha?

A Yes.

Q Is that Flacha or Flecha?



A Flecha.

Q Okay, Juan Flecha. You dispatched him to the Burke job on Alpine Street; right?

A My name's on it.

Q All right. Now, I have reviewed the sheets, and again, I am subject to error, Mr. Daley, and I trust between you and counsel you will at least double-check me, but I did not see Mr. Flecha's name on those sheets.

[RT 1145]

A Still could have been a request.

Q Could have been a request?

A Yes, sir.

Q Well, you didn't write "Request" on the document.

A That's true enough, but that doesn't mean it couldn't have been a request. There's several forms that can be taken in a request.

Q What are those forms, so we can find out?

A Telephone requests where I don't have a written one, so I get a telephone call for certain men, which I have to dispatch their names if they are in the hall.

Q Okay. But even if it's a telephone request, you are still supposed to at least indicate "Request" on there, aren't you?

A No, sir. No, sir, it's not a required procedure. It is only for our own information.

Q All right. Well, it is the practice of the dispatching procedure to write "Request" if the man is a request?

A Well, usually for our own information, yes, but not a law, or not a rule.

Q I see.

Well, referring you to plaintiff's exhibit 37, you will see here on May 1, 1968, Mr. Fenwick made a dispatch, and he indicated on there that it was a request by phone. Now, isn't the policy that if it is a request, he would write the full thing out, "Request by phone"?

A No, sir.

[RT 1146]

Q Okay. In other words, if it is a request, you may or may not put it down, and in your opinion, there is no requirement to?

A No requirement. It may or may not, true.

Q Now, with respect to Mr. Flecha, his name does not appear as being requested by the Burke Company on the prior request forms, at least as best as I saw them.

A Do you have any request from Burke Company on the list at all?

Q Well, let's just take a look.

I don't see any on this list. Here are lists. I maybe not have typed them all up, but I will assume there are none.

A You wouldn't have to -- yes, I would say so.

Q Let's just, for the sake of thoroughness, see if we can find a white slip for -- what was that, the Burke job?

A Yes.

Q Well, we do see a white slip for the Burke job, don't we? We see a 2-05-68, which is the date Mr. Flecha was dispatched.

It says the number of men, and it says "2," doesn't it?

A Yes, sir.

Q Now, presumably he would have been dispatched pursuant to that request, wouldn't he?

A I would say so, yes.

Q Now, there is no indication on there that you had a telephone request, is there?

[RT 1147]

A This is not required.

Q But if you had a telephone request, isn't it likely you would have written the name down?

Say, if Evelyn Folick took this request in the morning, wouldn't she put down "Juan Flecha is requested"?

A Right.

Q But she didn't?

A Is this the girl's writing?

Q I don't know.

A I don't know, either.

Q But this is the white slip for this job, inasmuch as this is the same address?

A It would indicate that.

Q And it doesn't show any requests?

A Which, again I say, is not required. We do it for our own information, to sort of keep things going.

Q Well, isn't it also for protection for the men, so that the other men who are sitting waiting on a list, and they see these people flying out of there --

A It is our job to protect the member at all times on that list, yes.

Q Isn't one of the requirements to tell the men when they see somebody's not even on the list getting a dispatch, that that's a request?

A If they come up and ask me, I will tell them truthfully that it is a request.

Q But sometimes you don't write it down on the slip?

A That's true.

[RT 1148]

Q Okay.

Now, showing you a work referral for Mr. Felix Montoya, dated February 6, 1968, signed by you; is that right?

A True.

Q Sent over to Wal Yea?

A True.

Q And that's a regular construction business; regular carpenter's work?

A Yes, sir.

Q Now, that would be dispatched off of the February 5th out-of-work list, wouldn't it?

A Should be, according to this, yes.

Q All right. Would you turn to page 8, line 1 --

A Top of the page?

Q That's right. He's on page 8, isn't he?

A Yes.

Q Now, is his dispatch indicated on this sheet? Did you write on there that he was dispatched out to Wal Yea?

A There's nothing written there whatever.

Q Doesn't that further confirm that sometimes you do write it, and sometimes you don't?



A This is true.

Q All right.

Now, can you tell us -- first off, Mr. Montoya was not a request, was he, to the best of your knowledge?

A I can't say. There's no way I can tell you that.

Q Okay. Well, I can show you the written requests that were there for that month. There is not a written request?

[RT 1149]

A From Wal Yea?

Q Well, let's just see if we have any.

A I doubt if you have any.

Q Why wouldn't I have any?

A Because you haven't got them for Burke.

Q I have them for a lot of other companies.

A Your list is not complete.

Q Well, that may be true. How can you tell my list is not complete?

A Well, you couldn't find Burke on there.

Q Well, you told me it may have been a telephone request.

A Could be.

Q Well, I don't have any -- Wal Yea was just -- for the convenience of everyone, wouldn't you say that I do have the employer requests for a good number of different firms in February of 1968?

A I would say you have.

Q And again, just for -- see if, by any chance, there's a white slip here for the Wal Yea job.

What is the date of that dispatch? Okay, I see one -- I see a Wal Yea white slip taken by Mr. Keen; is that right?

A Keen also dispatches.

Q But he took that order, didn't he?

A Yes.

Q And he took it, probably, on the evening or the afternoon before?

[RT 1150]

A You could tell -- sometime during the 5th, yes.

Q All right. Now, it's more than likely that that is the job that refers to the one that Mr. Montoya got sent out to, inasmuch as the address is the same?

A It looks like it would be that, yes.

Q Now, if somebody had told Mr. Keen the night before that he wanted a request of Mr. Montoya, isn't it likely that Mr. Keen would have written that down there so that the dispatcher would know it?

A I would say that he would write it down if there was a request by name, yes.

Q Okay. Now, wouldn't that indicate to you, Mr. Daley, that this man didn't have a request on that day?

A No, it wouldn't, because I have no way of knowing it, not really.

I would like to answer your question, but I can't really answer it; but this gentleman also indicates that it was a hard job to fill.

Q Possibly heavy?

A Do you recall what you're talking about? Steel pans.

Q Okay.

A So it's possible that I couldn't fill that job.

Q All right. Inasmuch as he's on page 9, I'm looking at page 8. That has no dispatches, or page 7, that has no dispatches. Page 6, that has no dispatches, at least that are indicated. Page 5 has no dispatches that are indicated.

[RT 1151]

By the way, did Robert Lopez and Mr. Rorenda, did they ever work steel pans?

A I don't recall the name, even.

Q A lot of the Mexican fellows worked steel pans, or steel jobs, steel form?

A Quite a number of them, yes. They made a steady job out of it.

Q And on page 4 there were no dispatches made, but there were some on page 3; so are you telling us, Mr. Daley, that you couldn't find anybody to do that work on pages 4, 5, 6, and 7, and you had to dip all the way down to page 8 in order to find --

A Mr. Hobart, I've had to go through 200 men to get a man to work on those jobs.

Q You don't know that is the situation?

A Not in this case, but it has happened.

Q That hasn't been your problem on steel form jobs?

A Oh, it became a problem trying to fill the job, sometimes.

Q Steel forms are that bad?

A Company was a hustler, and it was hard work.

Q Didn't any of these carpenters, I mean, any of these guys, didn't they have to take it? You know, you get a steel form job, don't you have to go off the list and say, "Here"?

A No, sir.

Q You mean to say if a guy would refuse a steel form job -- take the first name here,

[RT 1152]\*

Mr. Merriman -- and he'd\* refuse it, you wouldn't give him a date stamp for it? -- is he a specialty?

A Mr. Hobart, would you show me a category here saying "Steel pans" on here?

Q There is no category for it.

A That's right, that's right.

Q So, in other words, if you had a steel form job, then, a man who would refuse it, that wouldn't, in your opinion --

A I couldn't possibly feel that I could penalize a man for not taking a job he didn't want that wasn't listed.

Q I see, okay. Okay, we are moving right along.

Now, Mr. Lopez, Jose Lopez, got a job from you on February 6, 1968 to Better Builders?

A I don't even recall the contractor.

Q Okay. Well, Mr. Lopez is on page 5, line 13, if I'm halfway correct.

Right there.

A That's not Jose, that's Robert.

Q We will have to take a different one. We will have to hold him off the side. I don't want to misstate something.

Well, we've got a dispatch of Mr. Ed Praecon. Mr. Praecon was dispatched on the 6th to the William Simpson Company. Now, I didn't find his name on those sheets for the week of February 5, 1968, and it doesn't appear to be a request.



Do you have an explanation as to why he would be given a dispatch to the William Simpson,

[RT 1153]\*

when he was not even\* on the lists?

A Well, at this time it's quite a while ago, Mr. Hobart, and I can't recall definitely. These things popped up hundreds of times, so I wouldn't know exactly what the circumstances would be.

Q What things popped up hundreds of times?

A Dispatching procedures, where you could send a man out that wasn't even on the list because he was in the hall, and nobody else was. There was an obligation to send men out to a job when they were ordered, regardless of whether the list was there or not.

Q Well, let's just --

A We had an obligation to the contractor, you know, as well as our membership.

Q Let's just take a look at this, Mr. Daley. On the --

Your Honor, I have to get something for my throat. Can I get a lozenge?

MR. GEFFNER: I hear you have the flu.

May we approach the bench, your Honor?

THE COURT: All right. Do you want the reporter?

MR. GEFFNER: Yes, sir -- no, I don't think so.

(A conference was had at the bench, not reported.)

Q BY MR. HOBART: Are you ready to proceed, Mr. Daley?

A Oh, I'm sorry. Excuse me.

Q All right.

[RT 1154]

Now, with respect to Eddie Praecon being dispatched to the Simpson job on February 6th, Mr. Praecon, to my knowledge, does not appear on the February 5th list at all.

Now, can you explain the circumstances under which a man such as Mr. Praecon could be dispatched to that job when he's not even on the list?

A Yes. He could be requested by a phone call, and dispatched as a former employee. I would have to honor such a request.

Q And that's -- well, now, we do have, fortunately -- we do have William Simpson requests.

A Um-hum.

Q Let's just take a look and see if we have any William Simpson requests.

You can see, as a matter of fact, that there is a good number of requests by Mr. Simpson.

A For what job, sir?

Q Maybe various jobs, I don't know; but how many requests by the Simpson Company are there?

Let's count them. One, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen. Okay, so there are at least sixteen requests by the William Simpson Company during the month of February, and Mr. Praecon does not appear as a request.

Is your only explanation that possibly it was a telephone request?

A No, that isn't my only explanation.

[RT 1155]\*

I say, you\* have an address here of William Simpson, which is a huge company which employs

several hundreds of men, and requests all the time. Sometimes they are written for one job, and they are not written for another job. In other words, this is a reliable contractor, and he employs hundreds of carpenters every year; hundreds of them, and --

Q I recognize that, but I want you to tell me, can you point to anything, anything specific in writing, that would indicate to you that he was a request; where Eddie Praecon was a request by the William Simpson Company?

A I doubt if I could point out any instance where a request was made or not made.

Q And, Mr. Daley, isn't it true if he were not a request, this would be an illegal dispatch?

A No, sir.

Q If it was not an illegal dispatch, what other --

A Under the 25-percent law.

Q What 25-percent law?

A In other words, a contractor is allowed to hire 25 percent of his men by name, or any other way he wants to.

Q By request?

A Not request, no, not necessarily. There's nothing in the dispatching procedure that says a contractor must request by writing.

Q Okay, let's get one thing straight. He can request orally or by writing, either one?

A I would be on the jobsite, and he could orally request certain men.

[RT 1156]

Q Do you have anything at all to indicate that you think that this was a request?

A I can't recall the incident, Mr. Hobart.

Q You didn't write "Request" on it?

A Sometimes I never wrote "Request" on an order, I just took it for granted, and wrote the work order.

Q If he was not a request -- just assume that for a moment, recognizing that you do not concede that -- if he was not a request, then it would be an improper dispatch to send a man out to a job who was not on the lists?

A I can't see -- I can't see your question, Mr. Hobart. You are leading me into something I cannot answer.



Q If there was not a request of some sort, then it would be an improper dispatch, wouldn't it?

A No, not necessarily. I can't answer that question that way --

Q What other circumstances --

A -- because it's a supposition.

Q What other circumstances would make it a valid dispatch if it was not a request, oral or in writing?

A Well, the only other circumstance that would make it valid would be the honesty of the man writing it.

Q That's you?

A Certainly.

Q Well, I don't quite get the answer, what you mean by that.

A In other words, I'm trying to tell you that I done the job to the best of my ability, and at this time, five, six years later, you expect my mind and my memory to be accurate. I can't do that, Mr. Hobart. I'm only trying to say that I can't answer your question yes or no under that circumstance.

Q All right.

Now, again on February 6th a dispatch to Walter Rodenfels to the William Simpson Company, the same job that we have been talking about for Eddie Praecon.

A Yes, sir.

[RT 1158]

Q All right. Now, you didn't write "Request" on there, did you?

A True.

Q All right, let's see where he appears on the sheets.

By the way, Mr. Daley, you might note that on page 5 of these sheets appears the name of Richard T. Hill. That's for February 5, 1968.

A Yes, sir.

Q All right. Now, Mr. Rodenfels appears at page 7, line 12.

Is that his name there?

A Yes, sir.

Q He's got one thing checked. He's got "Forms" checked.

A Right.

Q That's the kind of work Dick Hill did, isn't it?

A Yes, sir.

Q Now, what would be the circumstances that would have caused Walter Rodenfels to be dispatched from page 7 to the William Simpson job ahead of all those people in front of him on the list, including Dick Hill?

A Well, there could be several. It could be that -- usually the dispatch hour was during 7:30, 8 o'clock, 8:30, and this dispatch order could have been written 9:00, 9:30, 10 o'clock, when everybody had gone home.

Q That's a possibility?

A Yes, sir, could be.

[RT 1159]

Q But you don't say that's what happened?

A Oh, it happens usually -- several -- quite often.

Q What was that William Simpson job, can you tell by the address?

A 800 West 2nd Street -- you know, I can't even recall the type of job it was, or what it was.

Q All right.

At any rate, is there any reason that you can think of that that job shouldn't have been offered to Dick Hill?

A It would have been offered to Dick Hill if Dick Hill was there.

Q I see. Why doesn't the dispatch show on the sheet, on these sheets? Why haven't you indicated that dispatch of Mr. Rodenfels to the Simpson Company?

A Again, this is not a law or rule of thumb.

See, this might have been a request, like I say, and I wrote it out, and no matter what this book -- could have been out there in the open somewhere, and I wrote the work order right there, and then handed it to him, and that was the end of it. I didn't trouble to go to the book and enter it in the book.

Q Now, you say that's if it is an afternoon dispatch?

A Or the usual hours. Men are dispatched out of the office all day long.

Q So he may have been a late dispatch, or telephone --

A Could have been any one of them. I couldn't say for sure on any of them, I don't know.

[RT 1160]

Q Now, we have a fellow by the name of Robert -- maybe you can tell me his last name -- Imbrecht, is that it?

A Yes, sir.

Q All right. Now, he's not indicated as a request for this William J. Burke job, was he?

A No, evidently. It doesn't look like it.

Q Now, he's on page 9 -- okay, 12. Is that him there?

A Yes, sir.

Q Is there any reason that you know of that this man who was so far down on the list was dispatched ahead of those people whose names are higher on the list than him?

A The only reason I can say is, inclusive of the others, that this job was in confusion at the start, and men were being dispatched to this particular job at all hours of the day.

Q How do you happen to recall that this 1030 Alpine job was one of confusion?

A Because I was the one that was getting confused by the superintendent on the job. I had several run-ins with him in making him pay the men that showed up on the job and not got the work.

Q Have you been advised in the last couple of days that this was one of the jobs that Mr. Hill went out to and that he had to turn around and come back?

A You wouldn't advise me of that, now, Mr. Hobart, would you?

Q I wouldn't.

[RT 1161]

A I wouldn't even know the job unless you bring it up.

Q But you are so able to remember it was a confused job --

A Only when there is outstanding circumstances.

Q I see, all right.

Do you know if he was an oral request?

A I wouldn't know that, sir, no, sir.

Q Would you agree with me he is not a written request?



A I'll agree with you if you say you don't have one there.

Q Well, I photocopied everything they gave to me, and Mr. Fenwick said I had all the employer requests for that period.

A I doubt if you have, because there's several instances where you couldn't have had, like oral requests on the jobsite, or a man coming up with a written request on a wooden shingle.

Q By the way, I saw that when I was in your office, so you still had that one.

A Okay.

Q Okay. So whether he's an oral request or what, you don't know?

A I wouldn't know, no, sir.

Q Now, Mr. Fenwick sent out a gentleman by the name of Wagner to the Crown Construction Company on February 7th, and he indicates that he is a request.

[RT 1162]

Now, he doesn't appear on the written requests, and he does not appear on the sheets for February 5th. I recognize you can't speak for Mr. Fenwick, but aside from the possibility that was a telephone request or an oral request, would you have any other explanation for the possibility

that a man who is not on the list is going out to work when others are sitting on that list waiting for work?

A Like I say, there could be several possibilities, but to finger-point them, I couldn't do it, Mr. Hobart.

Q All right, several possibilities. Again, that's possibly an oral request?

A That's right.

Q What was the other possibility?

A Phone.

Q Phone request? Okay.

David King job -- or David King sent out to Crown Construction Company. Now, that was by you, and you wrote the word "Request" on there?

A I must have conformed to -- that day I felt like writing more, I guess.

Q I guess.

You don't recall how you got that request, by any chance, do you?

A No, sir, I don't even know the man that I wrote it for.

Q You don't know David King; is that right?

A That's right.

Q I suppose, presumably, if you

[RT 1163]\*

don't know him, then\* you had to have a request; is that the idea?

A Generally, if I don't know the man or his record, or anything like that, I had to be satisfied by the contractor orally or by phone.

Q So this is possibly an oral request.

Now, L. J. Spencer was dispatched to R. H. Daum Company on that Belmont High School job. That was a pretty good job, wasn't it?

A Belmont High?

Q Yes.

A I can't recall the job.

Q Did it last a while -- All right,

A Oh, now I remember Belmont. Yes, that was a big job.

Q You dispatched a fellow by the name of L. J. Spencer, and he's not on the lists, either. Any particular reason why you dispatched him?

A I wouldn't have the least idea.

Q Okay. If he wasn't a request of one sort or another --

A We are back to this again?

Q Yes, back to this again.

If he wasn't a request of some sort or another, you should have offered that job to Dick Hill instead of a man not on the list?

A Who says I didn't?

Q Did you?

A I can't remember.

[RT 1164]

Q Dick Hill says you didn't.

A Mr. Hill is perfectly entitled to his opinion.

Q Okay. So you don't know if this was an oral request?

A No, sir.

Q It is a possibility?

A Possibility.

Q Mr. Wilk dispatched a fellow by the name of Boyarski on February 12th to the P. J. Walker Company.

Now, Mr. Boyarski also was not on the list. Would you have any way of telling, inasmuch as it's not a request indicated on here, would you have any way of indicating why a man who is not on the list would get this dispatch, as compared to the hundred or two hundred men who are on the list?

A I can't remember any incident that would indicate that.

Q One thing you'd remember, and that was Mr. Wilk almost always wrote "Request" on his slips, didn't he?

A No, because it's not required. It's only for our own information.

Q I know, but it was his practice to write the word "Request" where he had a request? Wasn't that pretty much generally his policy?

A Well, evidently it isn't a practice, because he doesn't have it written here.

Q I know he doesn't have it written there. That's my point, Mr. Daley.

A So it indicates that it is not

[RT 1165]\*

necessary to write\* it.

Q As to why Mr. Boyarski would be dispatched when he's not on the list, then, you don't have any idea?

A No.

Q Possibly an oral request?

A I can't say. I don't know.

Q Now, let me ask you this, if Mr. Boyarski was not a request, an oral, written, telephone or on the job, is there any authority that allows a man who is not on the list to be dispatched ahead of people who are on the list?

A Only thing I can say is the work order was written, and it was written in good faith.

MR. HOBART: Well, I will move to strike that, your Honor, as not being responsive, and calling for a conclusion of the witness as to whether Mr. Wilk wrote this in good faith.

THE COURT: Well, I think I will let it stand.



Q BY MR. HOBART: How do you know Mr. Wilk wrote it in good faith? Did he tell you about this one?

A Knowing the gentleman as I do, I assume his character -- if you attacked his character, I have to defend it, because he was an honest man.

Q So you are just assuming this honest man wrote this dispatch in good faith?

A I have every right to assume that.

Q But it doesn't indicate "Request" on there, does it?

A No, sir.

Q Now, here's one for Eddie Praecon,

[RT 1166]\*

dispatched on\* 2-13. Mr. Wilk wrote "Request" on this one, but his name doesn't appear on the out-of-work requests list -- or on the request list for the month of February, I should say.

So you would assume by that, then, if it was a request, that it would have probably been a telephone request?

A Could have been any kind of -- telephone, oral, or any kind of request, because in our rounds every day we went to different jobs

and got oral requests, and it was the general procedure.

Q Didn't you tell them to put it in writing?

A Not necessarily, unless the man had not been a former employee.

Q You are saying if he had not been a former employee that he would have to put it in writing?

A We would generally request them to put it in writing under the 25-percent procedure.

In other words, a contractor was allowed to hire one out of every four men, even though he hadn't worked for him before.

Q By requesting them by name?

A By name, orally, or otherwise.

Q Suppose that he had worked for him before, the man?

A He would request him the same way, Mr. Hobart.

Q All right.

Now, Joe Petino was indicated as a request by Mr. Wilk on a dispatch of 2-14-68.

Now, these sheets of 2-12-1968, Mr.

[RT 1167]\*

Petino appears\* at page 9, line 1. Mr. Hill, by the way, is on page 4.

Now, Mr. Petino's name does not appear on the written requests, so I guess that that leaves only the possibility in your mind it may have been an oral request?

A Yes, I would assume so.

Q Stephen Krailow, dispatched by Wilk, again with the word "Request."

Do you notice that Mr. Wilk seems to write "Request" on all of these? Would that give you any indication to think that the one he didn't write "Request" on wasn't a request?

A No, not necessarily, Mr. Hobart. He could write "Request" on 99 of them, and miss one of them. This is humanly possible.

Q All right.

Well, Mr. Krailow was dispatched to the J & J Metals as a request. He's not on the list for the request documents for February, so again, the explanation is possibly he was an oral request; is that right?

A Could be anything.

Q Well, what else besides an oral request?

A Telephone.

Q Well, I call that oral, talking.

A Well, yes. It's a medium of exchange.

Q Well, Mr. Krailow is requested again two days later by R. J. Daum on the Belmont High job. He is at this time being dispatched out again by Mr. Wilk -- by the way, do you know if Mr. Krailow and Mr. Wilk were kind of friendly?

A I don't know, sir. Could be that

[RT 1168]\*

the two jobs, \* one he didn't get the required hours, and was entitled to the second job.

Q That's a possibility, but it indicates he is a request, doesn't it? So that would have nothing to do with the required hours, and Mr. Krailow does not appear on the out-of-work lists as a request by Daum, and so I guess, then, that the only reasonable explanation would be that it could very well have been an oral request?

A Couldn't this gentleman have gone out for the job and got himself hired by asking for the job, and they'd send him in, say, "Go ahead and get a job work order, we'll put you to work."

Q Right, but I thought we had covered that, where a guy may go out and take the form, go out and get it signed --

A No, you can't do that. That's against -- you know, you're not supposed to go out there soliciting your own job --

Q Now, Mr. Daley --

A -- but it's done all the time.

Q Everybody in Carpenters Local 25 does it all the time, don't they?

A Everybody in every book.

Q I do know there were several requests by Daum.

A Several -- should have been quite a few of them.

Q Well, I see his name -- here's another one on the 15th, they requested somebody by the name of Reed Smalley.

A I wouldn't know.

Q Anyway, they requested a fair

[RT 1169]\*

number, but they \* didn't request Mr. Krailow, according to the written one, so you indicate that

possibly that's another oral request.

Now, we've got you sending out a Mr. Abel, to Sette Noonan. Do you recall what kind of a job that was?

A Framer. They are framers.

Q That's on February 19th.

A Couldn't offer that job to as many men on the list.

Q All right. Well, then, why don't we just strike that.

A Even Mr. Hill wouldn't take a job like that.

Q Okay, let's disregard that one.

By the way, I notice on the same day Joe Straveris is sent out to Fellows Association as a request by Wilk, 2-19; and, by golly, here you are dispatching on 2-19, also.

A Like I say, this could happen; but not at the same time, sir. I would not allow two -- anybody to help me dispatch, because that's only confusing the issue; but by the time I got through, then it could be written by somebody else, or even me afterwards.

Q Okay. I want to take this Abel one out.



A Take both of them. Here.

Q No.

A Both same type of job.

Q Fellows Association?

A Right.

Q All right. What kind of job was the Fellows Association?

A Framing.

[CT 1170]

Q That was a framing job?

A Yes.

Q There are framers on the list, though, aren't there?

A Certainly there are framers on the list.

Q Well, Mr. Straveris was on page 12 of the list at line 2, and he's not indicated in here, in the written documents, as being a request.

A Being a framer, a framing job, I would assume -- I have had very, very -- considerable trouble filling framing jobs, because

this is the job for young men.

Q Okay.

A I could go through a hundred men that have framing down there, but they wouldn't take the job when they found out it was a house framer on an apartment house.

Q Well, just for the kicks of it, I see that on page 11, which is one page ahead of where Mr. Straveris was, people who have indicated framing, there's one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve people on that one page alone.

A Uh-huh.

Q So that would indicate there were framers ahead of Mr. Straveris?

A This indication you're talking about is commercial; is that right?

Q That's what it says.

A That's right.

Q Fellows Association is a commercial framing company, isn't it?

[RT 1171]

A This wouldn't be -- you can't classify it as commercial. It's house builders;

strictly framing.

Q Okay, I will defer to your judgment on that one, too, then.

Now, on February 19th you dispatched Henry Elwell to the Turner job, 3400 Wilshire as a request, and yet his name doesn't appear on the request forms.

A I don't even know the man.

Q Well, we've got a lot -- we have some Turner requests.

A Oh, definitely. This was a big job. Several hundred on there --

Q Is that right?

A -- I mean, carpenters.

Q So possibly that's an oral request, then?

A Could possibly be.

Q All right. I think we are getting toward the end here.

How about Andrew Yuhas? He was a friend of yours, wasn't he?

A I wouldn't know whether I had any friends in that local or not, after I was in there

for a few years.

Q Well, he was a friend of yours, or at least he claimed to be, wasn't he?

A I wouldn't say that. Very few friends I had there.

THE COURT: Well, I think before we go into the social relationship we'd better take our recess until this afternoon.

[RT 1172]

How do you feel, Mr. Hobart?

MR. HOBART: Well, your Honor, I feel absolutely horrible, but I frankly would prefer to try to finish. I know it would be an inconvenience to Mr. Daley to come back a second day, and I have been planning on just resting somewhere.

THE COURT: All right. Well, I will provide the cough drops, and things like that.

Well, we'll adjourn until 1:30, and the jury is given the customary admonition.

(The noon recess was taken until 1:30 p.m. of the same day.)

[RT 1173]

THE COURT: All right.

MR. HOBART: Thank you, your Honor.

EARL GEORGE DALEY,

resumed the stand and testified further as follows under the provisions of section 776 of the Evidence Code:

DIRECT EXAMINATION (Continued)

BY MR. HOBART:

Q Picking up where we left off, Mr. Daley, still in February of 1968, we have a dispatch on February 6, 1968 by you. That would have been off the February 5th dispatch sheets, wouldn't it?

A Yes, sir.

Q All right. Now, this dispatch to Mr. Jose Lopez, unless I'm mistaken, does not appear on those sheets, and it does not indicate on your dispatch referral that it was a request.

Do you have any independent recollection as to what the particular circumstances of that dispatch were?

A Well, Mr. Hobart, again we're coming back to this thing. May I try to explain again, try to make it clear?

Q Surely.

A Requests were usually made by the business representative doing the dispatching, but [RT 1174]\*

requests were not\* necessarily the required thing, because I could be at the window and three or four men could come in there and be working for a company, and be on their payroll, and be transferring from one job to another, and would come in and request a work order before they went out on a new job, and I would automatically write these work orders.

Q That, then, would be one of the oral requests?

A That would be in-person request.

Q Well, when I say oral, I mean something less than written.

A Yes.

Q Telephone, person-to-person. You understand that when I say oral, I mean that could cover all of the possibilities?

A Naturally, it would have to be oral if they come up and requested a clearance, or a work order to go to work.



Q Okay, but on that dispatch you have in front of you, for Mr. Lopez, there is no indication that that was a request; in other words, you didn't write the word "Request" on it, did you?

A Like I say, it's not for me to say whether there was a request or wasn't --

Q Just answer --

A -- there could very well have been a request on it.

Q Just answer the question.

A Yes.

Q Did you write "Request" on there?

A No, I never wrote on this.

Q So that one, then, may have been

[RT 1175]\*

one of the oral\* requests; is that right?

A That, or otherwise. There could have been several differences.

Q Well, you keep saying other differences. Will you tell me what one of them would have been, other than an oral request.

A Well, just like I explained to you, Mr. Hobart, a minute ago, a man may walk into the hall right out of the area, and walk in there and say, "I'm working for Joe Blow, and I'm going on a job down here, and I want a work order." If he satisfied me he was working for them, and I was satisfied, I wrote him a work order.

Q What are you talking about, when a man comes in your office and says, "Hey, I'm working for Simpson Company. Give me a dispatch"?

A Yes, "Give me a dispatch, I'm going to work for Simpson Company," and he shows me a check stub. I have to honor that request.

Q That's an illegal dispatch, isn't it?

A No, sir.

Q How do you know he's --

A I have to take it for granted he's going to work because he's wanted by the company, if he can satisfy me.

Q So you are saying he is an oral request by the company?

A Well, it would be that way, if you put it that way, yes.

[RT 1176]

Q All right. But you don't bother to call the company to see whether or not this is an oral request?

A No, I don't bother to call the company, because if I did, I would be on that phone all day long, and not be able to do my job.

Q You say the men coming up to you all the time is such a frequent occurrence --

A I don't say all the time, just frequent enough to make it commonplace.

Q They give you no evidence of a request, no written request; they just say, "Well, I have been requested by the Simpson Company" --

A They don't say it that way.

Q What do they say?

A They say, "I'm working for Simpson down here on such-and-such a job, and I'm transferring over to such-and-such a job. Give me a work order." If they show me their card and they show me a check stub that they are working for the company, that satisfies me entirely.

Q You're only talking about the very limited occasion when a man transfers from one Simpson Company project to another Simpson project?

A This is not a rare instance.

Q That is what you're talking about?

A Yes.

Q You are not talking about a man coming in and saying, "I'm working for Simpson. I am transferring to Turner"?

[RT 1177]

A Well, of course not.

He could possibly do that, because he could terminate at Simpson and go to Turner.

Q Then he could go --

A Then I would assume Turner requested him when he sent in a work order.

Q In other words, if a man comes up to you and says, "Turner wants me on that job today," you just write him out a request?

A Not until he satisfies me that he qualifies.

Q What does he have to do to satisfy you?

A A check stub proving that he worked for the company in the past, or at the present time.

Q And if he doesn't hand you that information?

A Then I would say, "Go back to the job and get a written request."

Q All right.

Now, with respect to Lopez --

A I'm sorry, Lopez doesn't ring a bell with me.

Q As far as Mr. Lopez here is concerned, Mr. Lopez is not on the sheets, not indicated a request, but you say possibly he's an oral request or a transfer of some sort; is that right?

A True.

Q It's easy enough to check to see if there was a job transfer, to see what his job was before that?

A It would be simple enough to check the man's record, because if he worked for the

[RT 1178]\*

company, the company\* would definitely know of it, wouldn't they?

Q I would suspect the company would know, but how would you know?

A Being in the job I was, I had to make it my business to know quite a bit about everything I did there.

Q Mr. Daley, at the NLRB hearing that Mr. Hill filed against you and the local, do you recall that was over the issue of the William Simpson-Dinwiddie joint venture project? Do you recall that?

A Vaguely. Vaguely.

Q Do you recall that at that hearing you took, generally speaking, the position that telephone requests wouldn't be honored; that you had to have requests in writing before a man could be dispatched?

A I took that position?

A Yes.

A With who?

Q Do you recall taking that position?

A With who?

Q At the NLRB hearing.

A I mean, who did I take this position with?

Q When you were testifying at the NLRB hearing.



A That I took this position with the NLRB? What did they have to do with my dispatch?

Q Let me go back.

Do you recall that Mr. Hill filed charges against the local of the United Brotherhood for failing to honor a request of the William Simpson

[RT 1179] \*

Company, Simpson-Dinwiddie? \* Do you remember that?

A I vaguely remember this was something in the trial there, something like that, yes.

Q And do you remember testifying at the National Labor Relations Board?

A I remember testifying there, yes.

Q And didn't you take the position there that your policy, because you were -- what was your title, chief business agent, something like that?

A Business agent.

Q Didn't your card say chief business agent?

A Something in that order, but not chief. It said something about senior.

Q Senior?

A Senior. I was old enough to be a senior.

Q You were also the man who was in charge of things, pretty much, weren't you?

A Well, I wouldn't say that.

Q Okay.

Now, at the National Labor Relations Board hearing Mr. Hill claimed he was given an oral request by the Simpson-Dinwiddie Company. You remember that that was his claim, don't you?

A I don't know what Mr. Hill's claim was.

Q You have forgotten?

A I really don't.

Q You have forgotten, have you?

A Yes, because it never made too

[RT 1180] \*

much impression on\* me. Whatever that trial was, I didn't really take it serious at the time.

Q Well, do you recall that the National Labor Relations Board held against the union and in favor of Mr. Hill?

A Mr. Hobart, you wouldn't believe this, but I didn't learn that until about six or seven months ago.

Q Well, at this date I'd believe most anything.

Do you recall at the NLRB hearing, where you were testifying under oath, that had Mr. Hill been requested in writing he would have been dispatched, but it was your policy not to honor oral dispatches?

A My testimony, and what was the facts of it, if you're getting at it, was this: There was an agreement made with Mr. Simpson, William Simpson, at his own request, that he would ask for nobody by name, other than in writing. Whenever he wanted a man specifically, he would do so in writing, and sign his name to it.

Q And that was because of your policy --

A No, sir. I said Mr. Simpson, at his own request, asked for this sort of agreement.

Q Mr. Simpson took that position, did he not, because you had told him that you wanted all requests to be in writing, in order to conform to the rules of the business?

A Mr. Hobart, I was in no position to tell a huge company like Simpson or Dinwiddie, or anybody else, what they should do.

Q You couldn't tell them to -- in  
[RT 1181]\*

other words, they\* could tell you how to run your dispatch procedure?

A No. We had these negotiating periods where we sat down and we worked out an agreement on certain things. This is the way -- you don't kill the goose that lays the golden egg. The contractor has a moral obligation out of me, as well as my members.

Q Was it ever the policy of Local 25 to dishonor oral telephone requests?

A What do you mean, "dishonor"?

Q In other words, not send a man out.

A In other words, refuse a telephone request?

Q Right.

A Was it the policy of Local 25?

Q Right, when you were in there.

A At no time was it a policy of Local 25 to refuse a request, a legitimate request, for a workman.

Q Whether or not it was oral?

A Whether it was oral or written. If it was legitimate, it was supposed to be honored, because the workman himself is entitled to this benefit.

Q Mr. Daley, if my memory serves me correctly, when Mr. Scott testified, he testified that it was the policy not to honor oral requests of Local 25.

A Because this was Mr. Simpson's idea, himself, to clarify the picture on the jobsite.

Q Well, forgetting Mr. Simpson, and forgetting that one project alone, Mr. Scott told us it was the policy, at least after he was in --

[RT 1182]\*

that would have been in 1968 -- that\* it was not the policy to honor oral requests. Are you saying that he initiated something new at that time?

A This could possibly be to protect himself. He was new on the job, and he didn't know everything.

But over the telephone, I knew a contractor by name, or the workman by request, and I either evaluated it as being genuine, or if I had any doubts, then I would seek the written request.

Q Let's finish up with the few we have remaining here.

Do you notice that on February 19, 1968, Andrew Yuhas was dispatched to Fellows Association as a request by Mr. Wilk?

Now, again, if you wish to take my word for it, there is no such written request for him.

A I'll take your word for it.

Q All right. Again, then, the only explanation for that that you can think of would be that it would be possibly an oral request?

A Again, let me explain -- try to, again -- just try to lightly, not to take up too much time at it. This could be, this could happen, could very easily happen, that Mr. Yuhas, whoever he is, could come into the hall and say, "I gotta go to work at 14th and Central for Fellows Association. They're starting a new job down there," and if it was me, rather than Mr. Wilk, I would say, "Did you work for him before? He'd say, "Yes." I'd say, "Got a check stub? Show me a check stub."

[RT 1183]

The check stub, I'd have to honor that evidence right now, because I didn't have the right to refuse this man and make him go all the way back way down there to get a written request, and come back to the hall, and run him around in that fashion. I had to honor the evidence he presented.



Q Mr. Daley, are you saying if the William Simpson Company is putting up a building that is likely to keep carpenters working for a year, and a man comes up to you, and he's not on the list, or he's not high on the list, and he says, "Hey, I've got a request here, and I've worked for Simpson before. Look at my slip." You mean to say you are just going to send him out in front of all of these men without checking to see if it's a bona fide request?

A I told you I'd check him.

Q By looking at his check stub?

A Yes, and I would send him out. Now, if that was illegitimate, and he wasn't requested by the company, that phone would ring off the hook in a few minutes, before he ever got there.

Q Why?

A Because the company would be indignant, sending a man they didn't order.

Q No, that isn't true, Mr. Daley. Suppose the company had sent you an order for 10 carpenters, and hasn't requested any of them --

A That is a request.

THE COURT: Hadn't requested them by name --

THE WITNESS: Right.

[RT 1184]

Q BY MR. HOBART: -- and some guy in the past has seen this good job come in, and in the past had worked for Simpson. You mean you would dispatch him, if all he did was show you, "Hey, I've been requested, and here is my check stub"?

A No, sir, not under those conditions you have pointed out.

Q Well, what would you do?

A Well, what I would do, I would actually verify the man's statement to my own satisfaction. Now, if the man is sitting --

Q You don't recall the Simpson Company?

A No.

-- if a man is sitting in the hall, he's not going to come up and tell me he's been requested, because I'm not going to believe such a story.

Q Why aren't you going to believe it?

A Because he's sitting in the hall out there.

Q First off, Mr. Daley, it is true, isn't it, that people are fully aware -- carpenters are fully aware of what the big jobs are, the status of those jobs, for the most part? Carpenters keep aware of that?

A I wouldn't be here to testify if I had done what you told me, because they'd corner me if I'd done anything like you say.

Q They did corner you in 1968, didn't they?

A Yes, sir, but it wasn't for that, sir.

Q Well, all right, whatever it was for.

[RT 1185]

Mr. Daley, I want to know what you would do. You have already told us you do not check with the company, you take the man's word, so if you got an order, telephone order for ten men who are not requested by name, and Mr. So-and-So, who is at the back of the list, or not even on it, says, "Hey, Blackie, I worked for Simpson Company before, and they have requested me on this job"; previously you have told us you'd dispatch him --

A I don't recall any instance of that sort.

Q Well, Mr. Daley, it seems to me that your testimony has been that you would verify

his request by checking to see if he had a stub showing that he had worked for them before.

A Under certain circumstances, and you ignore the circumstances.

Q Tell me the circumstances.

A The circumstances is when they came in from a jobsite wearing the helmet of the company, and they were dirty, and looked like they were working, and I hadn't seen them in the hall before, and they don't hang around there, then I have some reason to suspect they are workmen, working at a job.

Now, if they are legitimate, they come in and get a work order before going on the job.

Q Well, what would they have to get a work order for, if they are already working on the job?

A I said, when they transfer -- look, many times -- this is another instance where you

[RT 1186]\*

could have a work order\* without a request.

Many times I go on the jobsite and find eight, ten, twelve men working. I immediately get a little bit indignant that they didn't follow the rules, so I make each and every one of them go individually down to the hall and get a work order.

Q Well, is it true that under the Master Labor Agreement no carpenter can go to work on any job --

A True.

Q -- unless he presents the employer, supervisor, or somebody, with the employer's copy of this?

A This is true.

Now, when you go on a job and you find that the whole crew there, including the foreman and superintendent, have just come in from another district and are starting a new job, without clearing in, which happens quite frequently, and while I'm out in the field I check this particular job to see why they haven't come in and cleared, and I find all of these men, they give me the usual standby, "We're coming in the morning."

I said, "No, you're not coming in the morning, you're going now. You know the rules. Now is when you're going in to get your work order." So they go into the office and somebody there must dispatch these men, because you cannot tamper with their time; so either Jimmy Keen or the girl in the office are authorized to write this work order and initial it, so that they would go out on the jobsite and have the work order in their pocket, or in their possession.

[RT 1187]

So there wouldn't be no request there. There would be a request by me that they go in and get this work order.

Q You tell me that occurred in February 1968?

A No, sir, I can't put a specific instance on any month or day in 1966, '7 or '8, or anything.

Q Perhaps you could tell us one job where that occurred.

A I can't -- specifically, one particular job?

Q Yes.

A No, sir, because they didn't stick in my mind as an outstanding event.

Q Mr. Daley, I'm not sure that I understand your testimony correctly. Clarify me if I'm wrong.

Are you saying that on several occasions, many occasions, that you will find a crew working, ten carpenters or so, who are working on a job, members of the local, who are dispatched generally out of Local 25 --



A Now you're putting words in my mouth.

THE COURT: Let him complete the question.

Q BY MR. HOBART: Are you saying you find these circumstances, where the men are already out working on a job, and they have never been dispatched through the hiring hall procedures?

A Quite often.

Q Now, that's a direct violation of the rules, isn't it?

A I could put charges against them  
[RT 1188]\*

and have them\* fined \$50, but I'm not there to penalize the members of the union. I'm there to help them, every one of them, no matter who they are.

Q Even Dick Hill?

A Mr. Hill, too.

Q As far as Mr. Yuhas is concerned, then, you don't know the circumstances behind this request; it may be oral, or it may be one of those times when somebody was out working on some job?

A No, I couldn't give you any idea of how that occurred, under any condition.

Q All right.

There is a job for Lou Altman on February 19th. Now, Lou Altman was dispatched to Steelform as a request on that job -- I take it back, not as a request, just dispatched by Mr. Wilk; is that correct? -- not as a request.

A Yes. Now, this Steelform Construction Company is a construction company, incorporated -- Could I explain this a little bit more?

Q Help yourself, by all means.

A The term "Steelform Construction, Inc., I-n-c.," is the name of a worldwide company. They are all over the world, and they do different types of work, but this is their trade name.

Now, their trade name has been confused with the type of work they do, which isn't true. They do every type of work. There are steel forms, actually steel forms, that are prized by certain carpenters to get onto. In other words,

[RT 1189]

the Simpson job on Bunker Hill, the Bunker Hill Project, two-, three-year job, was all steel forms. No woodwork, all steel forms, and the steel forms were made in such a fashion that the first one on the ground floor was here, and it

went right up the hill, and they progressed up the hill -- up to the top of the building, and each form specifically stayed one above the other, and was lifted by cranes up into that position, and anchored by carpenters.

And this job was prized because of its length, and rather easy tenure to do. In other words, there was no heavy lifting by carpenters on that job, it was done by crane work.

Q I see.

A So that is a steel form; then the other steel form would be the pan, or the inverted biscuit made out of steel, and the objection to this type of work was that the men, the carpenters, had to handle these inverted tins, or iron biscuits, and locate them in their correct positions, and they had to carry them by hand to each one of them, and they were of such a type that each carpenter had to carry one, which made it rather heavy, but not unusually heavy.

And then there was the other type of work that this Steelform Company did, was entirely of wood; wood bracings, wood columns, wooden decks, wooden beams, all entirely of wood.

Q Now, Mr. Altman, when he got sent out to that job -- who sent him out, by the way?

A I think it's Joe Wilk's signature.

[RT 1190]\*

It looks like\* it.

Q Mr. Altman was a man he used quite often as a steward, wasn't he?

A Yes, I believe he was used as a steward. He was also a trustee of the union.

Q All right.

Now, Mr. Altman, on that dispatch of 2-19, was on the out-of-work sheets for the week of 2-12, page 9, line 3. See that?

A Yes, sir.

Q Now, is there any reason you can think of that would cause him to be dispatched to that job from page 9 on the out-of-work lists, without having been a request?

A I wouldn't attempt trying to give you any reason.

Q Well, if he was not a request, and just assume it for the moment, without agreeing to it, if he was not a request --

A Seems we have been over this before.

Q Yes, we have. Maybe you will answer it this time.

If he was not a request, would he have been dispatched pursuant to the rules?

A I can't imagine the situation.

Q You just can't conceive of it happening?

A Just never heard of that happening.

Q Never heard of somebody being dispatched illegally?

A Not illegally. Maybe by mistake, perhaps, but not illegally.

[RT 1191]

Q Well, Mr. Altman was one of your regular stewards, wasn't he?

A No, I wouldn't say that.

Q - You wouldn't?

A No. The only job I remember him on as a steward was the Belmont High School.

Q Mr. Daley, if you again will be so kind as to take my word for it, which I must admit you have been very kind in doing so far --

A Glad to.

Q -- we have taken the deposition of Mr. Altman -- By the way, Mr. Altman has died fairly recently, hasn't he?

A Yes, sir.

Q If you will take my word for it, and I'll read it later, but Mr. Altman testified under oath that he served as steward on the Crocker Bank job, Jefferson Bank job, Belmont High School job -- and Ahmanson Theater.

Now, if what he says is true, wouldn't that give you some indication he worked fairly regularly as one of your stewards?

A It would seem so.

Q Yes, it would.

A But I don't recall the instances that you're telling me about.

MR. GEFNER: Can we have the dates of those jobs?

MR. HOBART: Well, it is in his depo, but I'll give you the dates, though.

[RT 1192]

The Crocker-Citizens Bank job was a one-year job from '66 to '67.



I didn't jot down the date of the Jefferson Bank job, but I think it's in the deposition.

Belmont High School was a one-year job, then he went over to Ahmanson Center. I don't have the dates on here right now.

Q In addition, Mr. Altman once ran for political office on one of your slates, didn't he?

A It's quite probable. He was elected trustee.

Q Well, can you do us any better than it is quite possible? Yes or no, he was on your slate?

A Yes, I think he was at one time, yes.

Q All right.

Now, Mr. Daley, I have here Mr. Altman's health and welfare records, and you will see the job we are talking about. Steelform, in February of '68, shows up in his health and welfare forms for February of '68 for 40 hours. Do you see that?

A Um-hum.

Q You have to answer audibly.

A Yes, sir. Excuse me.

Q You will see in January '68 he had just finished working 172 hours for the R. J. Daum Company.

A That's Belmont High.

Q Right. He had been working for them right along; isn't that right?

A Right. When I left he was on that

[RT 1193]\*

job. I don't\* know anything about anything after that.

Q Well, of course, you didn't leave in February of 1968. You didn't leave until the end of June or July; isn't that right?

A Yes, July.

Q Now, inasmuch as it does not indicate that he was a request, and inasmuch as he had just come off a job where he had numerous hours, the R. J. Daum job, can you give us an explanation how a man who is on page 9 can be dispatched out to a job in front of eight pages of other carpenters?

A No, I can't give you anything, no explanation, although I'll say this, I don't think anybody done him a favor to send him out on a 40-hour job.

Q Well, maybe it was just filling in. Take a look over here. You will see he was back on the R. J. Daum job in February, where he worked an additional 47 hours in February. Do you see that?

A That's not very long. That's one week, isn't it?

Q Does it look like maybe somebody was doing him a favor keeping him working, just when one job slowed down a little bit, sending him over to something else?

A If that was the case, I think it would be more than a week.

Q Except the R. J. Daum was a good job, wasn't it?

A I would consider it so, yes.

Q After that one week at Steelform he went back to R. J. Daum, and he worked in February. In March he had 121 hours, and in April he had 155 hours at R. J. Daum. In May he

[RT 1194]

had 176 hours with R. J. Daum.

A Seemed like he was steadily employed by them.

Q That's right. Doesn't it seem rather odd he'd get a 40-hour fill-in job with Steelform --

A I wouldn't say --

Q -- from page 9?

A I wouldn't say it was odd. The man had a family, he had to work, and if he was laid off by R. J. Daum temporarily, he had to fill in somewhere.

Q Don't you think that the men had families who were on pages 1, 2, 3, 4, 5, 6, 7, 8, and they also had to seek employment?

A You'd better believe it.

Q Well, then, how do we justify Mr. Altman getting what appears to be favored treatment?

MR. GEFFNER: Your Honor, I object. Mr. Hobart is not only argumentative with the witness, but he is stating questions Mr. Daley has repeatedly answered he had no specifics as to each carpenter. He's been over and over each point.

THE COURT: Well, I think it is argumentative.

MR. HOBART: Your Honor, I would offer the health and welfare record of Mr. Altman

into evidence as plaintiff's next in order.

THE CLERK: 48.

THE COURT: All right, plaintiff's 48.

Q BY MR. HOBART: So then, as far as how or why he got that dispatch, you are just in no position to [RT 1195]\*

just in no position to give any\* speculation; is that right?

A That's what I think, I can't in any way say anything.

Q By the way, if I seem -- if you see me writing anything on the back of these that's improper -- I wrote "No opinion" on the back of that one. Is that fair?

A Yes.

Q Okay.

Now, going to Joseph Williams, dispatched by Mr. Wilk as a request to the R. J. Daum Company on February 20, he's not on the request list, and he's not on the sheets at all, the out-of-work sheets. Would you have any opinion as to how he got this dispatch?

A Still that same answer, I couldn't give you an opinion.

Q Okay.

Now, George Haynes, dispatched --

Your Honor, I think I feel like I'm going to to sneeze.

THE COURT: Any time you don't think you can carry on, let me know, and we will break.

MR. HOBART: I will be all right. Let me get a drink of water.

(Discussion off the record.)

Q BY MR. HOBART: Now, Mr. Haynes appears on the sheets of 2-19-68, page 9, line 5. Do you see that?

A Um-hum.

Q Here again we have a dispatch

[RT 1196]\*

that's not indicated\* on these sheets.

A And again I say it was not a rule of thumb.

Q Now, would you have any opinion as to how a man that's on page 9 would get a dispatch --



MR. GEFFNER: Your Honor, I object. Mr. Daley has answered, by my calculations, 15 to 20 questions where he's testified that if it's not marked, it could have been an oral request of one nature or another, he had no personal recollection of the individual dispatches, and we are just going over exactly the same ground, and I object on that basis.

MR. HOBART: Your Honor, I have two more left on this month, and I think it is material because --

THE COURT: Well, all right, go ahead. I will overrule the objection.

Q BY MR. HOBART: Would you have any opinion on that, Mr. Daley?

A No opinion on that, but you do have a -- I think Mr. Wilk made a point of noting that the job was of two- or three-day duration.

Q Okay. Now, assume that a job is of a two- or three-day duration. Now is there any reason you can think of that a man high on the list might turn down that job?

A Well, yes. He would jeopardize himself if he got 18 or 20 hours, or something like that. He might have to go to the bottom of the list, or he might just want that job himself. There's quite a few of them wanted two-day jobs, and no more.

Q But assume we are talking about  
[RT 1197]\*

a man who you\* referred to in general terms, a family man who has responsibilities, who wants steady employment. Are you saying that he would turn down a two- or three-day job because it would end up getting him on the bottom of the list?

A He had every right in the world to turn it down.

Q I see. And consequently, Mr. Haynes, who is on page 9, and there's only 12 pages on the list --

A Only?

Q Well, the point is, he wouldn't drop so far by taking that job, would he?

A Well, I don't think that has anything to do with it.

Q Well, if a man is on page 9 -- strike that -- if a man is on page 2 or 3, and he's offered a two- or three-day job and he wants steady employment, if I understand your testimony correctly, it would be unlikely that he would take this job?

A Very unlikely, because I felt it my obligation whenever I was there to inform the

carpenter of how long the job's duration would be, if there was an estimate on the job.

Every time I got a phone call or a clearance of a job, it was my duty to find out the length of the duration of the job as near as possible. So if I dispatched a man to a job, and it was a two-day job, he'd have every right to come in there and really violently object to such a treatment.

Q I see. Because he'd end up getting knocked off the list?

A No, I'd end up being knocked off  
[RT 1198]\*

my feet. That's\* the way he would do with me, and he'd be right.

Q For giving him a two- or three-day job?

A Yes, sure, dispatched that way, and knocking the pins out from under him. I don't think I had any right to do that.

Q Is that the reason, then, that a job, say a two- or three-day job, would be taken by a man pretty far down on the list?

A No, quite a few of them preferred two- or three-day jobs for personal reasons.

Q Okay. Well, could we presume, Mr. Daley, that this job for two or three days Mr. Haynes took was offered to all the people who were there to have it offered to them?

A Can you say that it wasn't?

Q Mr. Daley, I'm only asking you a simple question.

A I don't know.

Q Can we presume that was offered to those people?

A We can presume it was offered to anybody in the hall at the time.

Q And that most of the people, then, until it got down to George Haynes on page 9 said no, they didn't want it? Isn't that an honest presumption?

A Well, I don't think we'd go through the list and waste our time and the men's time on what would be, obviously, two days' duration. It would be merely called out, "I have a two- or three-day job here. Who wants it?"

Q Who will take it, and if Mr. Haynes is the highest on the list, since he had priority --

[RT 1199]

A        If there's two of them, the first one on the list, he got it.

Q        So Mr. Hayes would take it?

A        Yes.

Q        Well, that certainly is an explanation why this job was dispatched from page 9.

A        Well, thank you, Mr. Hobart.

Q        So I'm going to write on here "Two- to three-day job taken by man low on the list."

Okay, the last one. We have one, again -- we have that same job. Mr. Ed Monty was dispatched to that job, again, not as a request, but it says "Two or three days" on there, doesn't it?

A        Um-hum.

Q        And Mr. Monty was on page 11, and I suppose the answer would follow, again, that the only persons who would be interested in that job, for the most part, would be men who are down below, and don't have far to drop if they are taken off the list?

A        Or for their own reason.



## APPENDIX

# IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75 - 804

JOY A. FARMER, Special  
Administrator of the Estate  
of Richard T. Hill,

Plaintiff-Petitioner,

vs.

UNITED BROTHERHOOD OF  
CARPENTERS AND JOINERS  
OF AMERICA, LOCAL 25,  
et al.,

Defendants-Respondents.

---

ON WRIT OF CERTIORARI TO THE  
CALIFORNIA COURT OF APPEAL  
SECOND APPELLATE DISTRICT,  
DIVISION FIVE

---

PETITION FOR CERTIORARI  
Filed December 5, 1975

CERTIORARI GRANTED  
January 26, 1976

Q For their own personal  
they may have been going out to the track the  
following day?

A Or they might have been dodging  
alimony.

\*\*\*\*\*

MR. GEFFNER: May we approach the  
bench, your Honor?

[RT 1200]

THE COURT: All right. Do you want  
the reporter?

MR. GEFFNER: Yes.

(The following proceedings were held  
at the bench.)

MR. GEFFNER: Your Honor, what Mr.  
Hobart has done is selected one month at random  
out of over a two-year period, of which we have  
hundreds and hundreds and hundreds of work  
orders, and the testimony we have to date is that  
on the dispatch slip that a man is dispatched  
either by request, either by a man coming in him-  
self, or by the company calling in, or by the  
company writing in, or by the business agent  
finding the man a job on a transfer from a  
company to a jobsite, and sending him down for  
a request; various ways where a request may be  
written.

Now, in the absence of any other evidence, for Mr. Hobart simply to put in at random, whatever they are, 22 work referrals, without any showing, any evidence that these men were not requested -- which is his burden to show that they were, then, illegally dispatched, as he puts it, and they were not requested under one of the various systems the witness has testified to, and just simply putting in 22 odd names of carpenters and encumbering the record, confuses the jury, and has absolutely no relevancy to any of the issues in this case.

There is no showing of the illegality of the dispatch procedures in general, or more importantly, and specifically to Mr. Hill. All he's done is pick out names -- that is, a work referral,

[RT 1201]\*

where there is no written request, \* which is only one of the systems.

I'm not even sure that all of the requests are available. There's other systems of requests, and there's no tie-in with these individuals. Why confuse the jury and encumber the record?

THE COURT: Well, I think it goes to the weight and not the admissibility, so I will receive these particular referral slips.

MR. GEFFNER: Well, your Honor, does that mean that I have to then go in on defense and contact all 15 -- all 22 men and 22 companies and

find out whether they were requested? Because I have to do that to answer this.

THE COURT: I don't think you have to do that. You have the testimony of your dispatchers, such as this gentleman that's on the stand, and we have others as to what the practice was in February of 1968.

MR. GEFFNER: Yes, but, your Honor, without a tie-in, leaving the record the way it is, with the dispatch records in evidence, the only way outside of the testimony of the dispatcher to completely rebut any inference that might be drawn, which I think could be damaging, is to show on each one of those jobs, by either the carpenter or by the superintendent, that he was requested in one form -- which I could do, but that means bringing in 22 different instances as to the fact they were requested.

You know, I can do it. It's just a question of mechanics, and rounding up these carpenters. I assume most of them are available, except the

[RT 1202]\*

ones that are dead. The\* companies are in business. I can contact all the superintendents and find out if they requested all these men. I feel absolutely certain I can, but it means I have to prolong the trial and bring all these other witnesses, which I feel I would have to do, by bringing in the irrelevant --

THE COURT: Well, I think it is admissible, and we will just have to be confronted with the possibility.

MR. GEFFNER: You are putting me to a tremendous job, and the court, as well.

I can represent to the court these carpenters are available, their superintendents are available, and these were requests, and this means I have to go out through the logistics to satisfactorily answer 22 slips.

THE COURT: Well, these are problems of trial tactics. It doesn't solve my problem on admissibility.

MR. GEFFNER: Okay. Just don't get mad at me, your Honor, when I bring in 22 witnesses and prolong the case for days.

THE COURT: We will have to face it.

\*\*\*\*\*

[RT 1237]

DIRECT EXAMINATION OF EARL GEORGE DALEY (Resumed)

BY MR. HOBART:

Q Mr. Daley, I believe that in our last session we were beginning to draw your attention to the sheets of March 13, 1967.

Can you tell me what page Mr. Hill is on, and what line?

A He's on page 3, and one, two, three, four -- line 5.

Q And for the preceding week he was [RT 1238]\*

on page 3 at\* line what?

A Line 7.

Q Now, inasmuch as we don't have any records for that period of time, Mr. Daley, could you give us an explanation how a man could spend a week on the sheets, and actually gain but two positions; only two men in front of him get dispatched?

A Sometimes we have a slack period.

Q Well, taking a look at the period of 6-13, we see that that period shows not too much slackness. We see one, two, three, four, five, six, seven, eight, nine -- at least nine dispatches that are shown on these sheets, and you have already told us that a high number of dispatches are not shown on the sheets.

Do you recall in particular whether that period of time was what you call a slow period, or is that just a guess?



A No, I wouldn't recall that particular period.

Q That would be a pretty short move up the list, wouldn't it?

A Not necessarily, not unusual.

Q It is not unusual just to move up two places in a whole week?

A Not unusual.

Q Well, I'll tell you, unfortunately, we don't have records for those periods of time, but we have records for all of 1968.

Can you suggest one time in 1968 when

[RT 1239]\*

the same phenomenon occurred?

A I wouldn't --

Q Just one. Just think about it.

A No, sir; no, sir.

Q Well, before you say no, think about it. Maybe you can.

A No, sir, I can't, really.

Q You have never even heard of it before, have you?

A I didn't say I hadn't heard of it, you asked me if I recalled it.

Q Well, then, I'm going to ask you to do it this way. You think for a second, and see if you can try to remember one for all the time in 1968, or the last half of 1967 -- we've got those records, too -- or any part of 1969, where the workmen on these sheets only moved up two places, a man on the second or third page.

Just take a second and see if you can think of any such period, aside from the strike, we'll say.

A Well, in the back of my mind I know that this has happened, but to specifically point out a certain period, no, sir, Mr. Hobart, I can't do it.

Q Mr. Daley, isn't it true that one of the explanations for that is that dispatches were going out of that office that were not being recorded, that were not being stricken out, and that were not being taken out of order, and that's one of the reasons for the lack of a man moving up in his rightful position?

A I'd like to hear that again.

[RT 1240]

Q Yes, sir. I said, isn't it true that one of the reasons that Mr. Hill and others on that particular occasion, these books of

March 6th, March 13th, Mr. Hill moved up from line 5 to -- or line what? 7, I guess it is, to line 5 -- in a whole week, isn't it because a good number of those dispatches that did go out went out under the table, so to speak?

A To my knowledge, I never knew of one dispatch that went out under the table.

Q Did you ever dispatch a man out in the evening? Did you ever give one man a dispatch in the evening, rather than in the morning?

A Yes, I have.

Q Now, can you tell me if you give as many as 10 men dispatches in the evening?

A Very possible.

Q Now, pursuant to what authority, Mr. Daley, would you give these men these dispatches?

A I wouldn't quote it as authority, but if you have 10 men come in in the evening with requests from a contractor to go to work the proceeding morning, I didn't feel it my duty to penalize them a day's pay by making them wait until in the morning, because they weren't on the books, anyway. They were requests by the company, and transferees, or steady employees of a particular project.

Q Do you recall where you made your notations for those dispatches, so that we would know?

A My notations?

[RT 1241]

Q Yes, where would you make a notation so somebody could check to see if indeed that was a valid dispatch, or whether it was just you playing favoritism?

A Well, there wasn't no set rule for such a procedure, but I felt at the time that if there was a question of it I could fully satisfy anybody that was in doubt, or wanted to find out about it.

Q Mr. Daley, I see our employer requests that we have retained somehow start in July of 1968. Now, that's when you left, isn't it?

A Yes.

Q Would you happen to have any personal knowledge as to where any of the requests for prior to July 1968 are, the ones when you were in office?

A Would I have any knowledge of that?

Q Yes.

A Not after I left the office, sir.

Q You left the office, you didn't make any notes or compilations in order so that you could go out of office knowing what records were there and what records were not there, so that you would know what you could be held accountable for, and so forth?

A I'm afraid I didn't.

Q You wouldn't have copies, or know where copies of any of the work referral slips for, we will say, a period in -- oh, wait a second, maybe we do have them -- yes, we do have some for February 1968.

Mr. Daley, neither you nor I have had a

[RT 1242]\*

chance\* to do this before, so one of us is going to be surprised.

You indicated to us yesterday there's a whole bunch of these oral requests that somehow don't get the word "Request" written down on them. Now, I've got here in front of me photocopies that I took of the written requests out at Local 25, back in early 1970, late 1969, whenever it was I was out there.

Let's see if you forgot to write down the word "Request" on any of these. Can you tell me who the men requested is on this one up here

you're looking at?

A You asked me if I know the man?

Q You can just read the name, is what I'm asking.

A Oh, yes. Yes.

Q What name can you read?

A Walter Noll.

Q And the date of that dispatch appears to be, at least the date of the request appears to be? What's the date of the request?

A Oh, 2-21-68.

Q Okay. Now here's one that comes as a surprise to me. That one doesn't say request on it, does it, but he was a request, wasn't he?

A Well, as you say, there's no request on that.

Q That's what I say, that's a surprise to me. Let's keep going.

How about Mr. Payne on the 21st?

A Delmar Lloyd Payne on the 21st.



Q Well, Delmar Payne -- well, the  
[RT 1243]\*

word "Request"\* shows up on his, doesn't it?

A Yes, sir.

Q All right, let's separate the ones  
where the word "Request" shows, and the ones  
where it doesn't.

What does this look like? Does this look  
like a Mr. Ole Jacobsen? Is that what that looks  
like to you, the William Simpson Company on the  
20th?

A That would appear to be Ole  
Jacobsen, yes.

Q Let's see if we can find Ole  
Jacobsen.

Okay, here's Ole Jacobsen, request for  
the Simpson Company; and does the form say  
request, or not?

A Request foreman.

Q Okay. At any rate, at least that's  
not a surprise to me. Let's go on.

I can't read that one, so we'll -- that's a  
kind of light. Maybe you can see who that's for.  
If not, we have others we can skip to.

A This is an employer, sir, and this  
is where the man's name is. There's nothing  
there.

Q Well, it just didn't come out, so  
we'll just take the next one.

This looks like Gary -- is that Lohman?  
-- being requested by somebody or other on the  
19th.

A That's what I would make it out  
as, Gary Lohman; but I don't know who -- what  
the request is. I can't read the company.

Q Okay. Well, let's just see if we  
can find that request for Gary Lohman.

[RT, 1244]

What date was that?

A The 19th. Go back to the multiple  
list, could be on that.

Q To what?

A To the multiple list.

Q Of course, these aren't 100 percent  
in order, either.

A There it is.

Q There we are; and he does have the word request written on him?

A Yes, sir.

Q Okay, that's another nonsurprise for me, isn't it?

Let's try to Mr. Gilbert on the 19th being requested by the William Simpson Company. Harold Gilbert, is that his name?

A Yes.

Q There we go; is that him?

A Yes.

Q Does the word request appear written on that work referral?

A Yes, sir.

Q All right, let's put it over here, then.

And we have a Robert Bailey being requested to Steelform on, it looks like, the 20th, doesn't it?

A Yes, it seems to be the 20th.

Q Robert Bailey. We'll look for him around that date, anyway.

Ah, here we go. Steelform, right, on

[RT 1245]\*

the 20th,\* and sure enough, it says, "Request," right on there, doesn't it?

A Yes.

Q And the last one on this one page seems to be a Daniel Martinez Guerrero. Is that how it looks to you?

A Which one, this one here?

Q Yes. I realize that it's hard to read, and if you can't read it, we will skip it. It's on the 19th.

I will take a quick look to see if I see anything.

A It's Guerrero, that's the way I make it out. I'm not sure, it's very faint.

Q All right.

Oh, is this him? Daniel M. Guerrero?

A Seems to me.

Q Again, you dispatched him, and you wrote the word "Request" right on there, didn't you?

A Yes.

Q By the way, you just pick any other date in here, if you want to, Mr. Daley. I assure you, I have just picked them at random. If you'd like to --

A Here's the 19th.

Q Well, I know, but we haven't got to that one yet, have we? I'm talking about going off the request list here.

A This is a request list.

Q All right.

A This has to be a request list.

Q Does it have to be?

A Yes, it is, it's multiply done that

[RT 1246]\*

way. It's\* a sample of what I told you could happen in the evening.

Q All right. Well, let's hang on to it, maybe we will find it.

This is one of those evening ones, huh?

A Well, it could be. I didn't -- I didn't say that.

Q Okay, let's try January 1 -- I mean, January 5th, Andy Yuhas to Ruane Corporation.

Okay, here's Andy Yuhas requested by the Ruane Corporation, and the word "Request" is on there.

How about a Clarence Kane on February 16th. We'll jump to February the 16th, see if we can find one for him.

There we go, there's his. The word "Request" is written on it for him, too.

Hiroshi -- quite a few fellows on that one. What date is that? -- 29th, Steelform. Let's see if we can find something for 2-29, Kiriu, Rodriguez, Guerrero, Steelform, huh?

Did we miss it? Don't let me jump past anything. You just keep an eye on me.

Here we go, that's this one right here, isn't it?

A Yes, sir.

Q And again you have the word "Request" on there.

Have we got ten yet? I didn't want to do this forever, but I would like to get -- yes, we have ten, and we have ten where you have written the word request, that we have taken just at random out of here, and we've got one where you



haven't written the word request on these sheets, Mr. Daley.

[RT 1247]

Okay, is this the next one? I thought that's the one we just had.

A No, there ain't no request on that one.

Q These are different people. You will agree with that, that's not the same?

A No, but it's the same man. He's a foreman.

Q Well, we don't have the request form in front of us, and for the moment, to keep us from going through all of them, we've got one, and I will certainly agree with you that there could have been more than one in the history of your dispatching procedure, Mr. Daley.

But the point I'm making is this, when you have a written request, that is, a request where you've got physical evidence that the man was requested in case anybody would ever be critical of you, you write the word "Request" on here.

Based on the 10 we took at random, you wrote that word request 90 percent of the time, 9 to 1, and yet yesterday you went through stacks for one period in the month of February in 1968, and when the work request didn't appear there,

you said, well, that's probably a telephone request.

Mr. Daley, would you tell me what it is; what is the significance, or what is the difference, giving yourself any latitude to come up with anything you like, as to why you would write the word request when you have physical evidence of the request, and yet when you claim to have some sort of a telephone request for a man, you don't bother to write that down on his work dispatch sheet?

[RT 1248]

A You emphasized telephone requests. If I remember right, I said it could be telephone requests, could be one of a number of reasons.

Q That wasn't my question, Mr. Daley. My question was, why do you write the word request down when you have written evidence of a request in front of you, proof of it, and why do you not write the word request down when you claim it is an oral request?

MR. GEFFNER: Your Honor, I'd object. This question has been asked and answered, to my recollection, at least four times last week, and Mr. Daley has testified as to his practice in terms of writing down request, or not writing down request, depending on whether he happened to write it down or not, and Mr. Hobart is simply arguing with the witness at this point.

MR. HOBART: Your Honor, I'm not trying to argue. I think it is a very crucial point.

THE COURT: Yes, we will see if we can produce an answer, and if not, well, go on to another subject.

BY MR. HOBART: Do you have any more of an answer than you have already given?

A I'm afraid you will have to start again, sir.

Q Mr. Daley, as we have shown, approximately 90 percent of the time when you have a written request you physically write the word "Request" or the initials "req" or at least on 90 percent of the work referrals that went out of that office.

Now, yesterday you tell us that when you  
[RT 1249]\*

get an\* oral request, or something over the telephone, or when a man comes in and says, "Hey, I worked there before," you don't write the word "Request" down on that dispatch, and I'd like to know why, on the one hand when you have proof of the request, you do write it down, and when you have an oral request in which there is no proof, you don't write it down.

MR. GEFFNER: Your Honor, that was not Mr. Daley's testimony. I object on the grounds he is stating answers in his question, that it is not Mr. Daley's answers.

THE COURT: Well, I think Mr. Daley can answer the question, and point out any discrepancies between the question and what his testimony has been.

Go ahead.

THE WITNESS: As I've stated before, there's any number of reasons, to particularly enumerate it now; but one of them is what I just brought out this morning, that eight or ten men, or one man with eight or ten cards, could come to the hall in the evening and request a job clearance where they had to go to work someplace far away in the morning at 7:30, before we open the hall; so I felt it my duty to see that these men had their request to go to work, so I would write them out either singly, or if I was in a hurry, with a multiple list.

So It's entirely possible that I wouldn't put the word "Request" down on this particular thing. It could have been a job clearance.

Q BY MR. HOBART: What do you mean, it could have been a job clearance?

[RT 1250]

A In other words, it could be a new job starting up, and the man came in under the rules of his union to clear himself for this particular job.

Q Men can't come in just because a job is starting up and say, "Hey, Mr. Daley, there's a job starting up. I want clearance to go on that job"?

A He doesn't say it that way, sir. He comes in and requests a clearance, and proves himself an employee of the job address that he has pointed out, and then it is my business to know that this job is there, and it has or will be started.

MR. HOBART: May I have that answer read back, your Honor?

THE COURT: Very well.

(Answer read.)

Q BY MR. HOBART: How does he prove himself an employee of that job, Mr. Daley?

A By showing a check stub of a reasonable length, like a couple of days before, a week before.

Q What happens if the job is just starting, and he hasn't had a chance to?

A As I say, he's a regular employee, and therefore, he's entitled to come in and demand a request clearance.

Q Say that again.

A He's a regular employee, and therefore, he's entitled to come in for a job clearance to another project.

Q If he is a regular employee, he doesn't have to come back to you for anything --

[RT 1251]

A Yes, sir.

Q Once he's been out to that job, signed out there validly, he's got to keep coming back to the hall?

A Again, you twisted my words.

I said he's a regular employee of the company, and therefore, entitled to a job clearance to start a new project.

Q All right. Mr. Daley, I know that a man who is a regular employee of the company, as well as a man who is not in the regular employ of a company, has a right to be requested; is that right?

A Yes, sir.



Q Now, once a job is started up, no man has a right to come to you and say, "Hey, Simpson's got a building going over there. I worked for Simpson before. I am a request. Please send me out a request slip, or a dispatch slip"?

A I'm afraid you're putting it absolutely wrong, sir.

Q You mean to say they can do that?

A Not the way you say it.

Q Well, I put it in the negative, Mr. Daley.

A Well, I'm afraid it creates -- I can't answer it the way you say it, because it's a wrong impression in my mind.

If a man is a regular employee he's entitled to be transferred from one job to the other.

Q If he's a regular employee for Mr. Simpson?

A Yes, sir.

[RT 1252]

Q And if Mr. Simpson asks him to be transferred; right?

A Yes.

Q All right. Now, let's look at that man. Let's forget all about anybody who's got any present connection with the Simpson Company all right? Let's just get down to Joe Blow, who's sitting on these books hoping he's going to get a fair shake. Let's talk about him.

Now, the man who is on page 11 of these sheets, does he have any right to come to you and say, "Well, Mr. Daley, Simpson Company is out here starting a building. I have worked for them before. They want me again. Here's my check stub to show I worked for them a year and a half ago. Please send me out with a dispatch slip"?

A I'm afraid the way you put it, it couldn't be done that way.

Q First off, if you did it that way, it would be a violation, wouldn't it?

A Wouldn't be no violation, because it wouldn't be honored.

Q I take it, then, if it had been honored, it would be a violation?

A It wouldn't have been honored.

Q Well, Mr. Daley, we have gone through numerous people in February of 1968 who were dispatched from the bottom of the list, and from elsewhere, not even on the list, so when you

say it never happens, I assume that is a bit argumentative.

[RT 1253]

A I didn't say it never happened, I said we wouldn't honor such a thing if it came to our attention.

Q My last question to you on this area, Mr. Daley, is simply, do you have any explanation for writing the word "Request" on these work referrals that we have gone through this morning about 90 percent of the time, and yet on those dispatches of people who were taken off the back of the list, and people who weren't even on the list that we went through last Thursday, for during the month of February 1968, you don't write the word "Request" at all, or -- well, stop right there -- many on which you didn't write the word "Request" at all, yet you claim a request.

Is there some reason that you can think of that you didn't write some explanatory note on those people's sheets, as you do on the sheets of the people who get these legitimate requests?

A There's no law, or no written law, or no rule that requires the word "Request" to be written on a work referral. It's not that important.

MR. HOBART: Your Honor, I'd ask that these 10 work referrals that I just went

through the list with to show that the word "Request" is written on approximately 90 percent of the time, be admitted collectively as plaintiff's next in order.

THE COURT: All right, that will be 55.

Q BY MR. HOBART: Mr. Daley, directing your attention to the out-of-work sheets of 3-20-1967, page 2, Mr. Hill is on line 14; is that right?

[RT 1254]

A I would --

THE COURT: What page?

MR. HOBART: Page 2, line 14.

THE COURT: Without counting them, I will take your word for it.

Q BY MR. HOBART: Now, the following week, Mr. Hill, that's on the sheets of 3-27, Mr. Hill is on page 2, line 15.

Would you agree with me that it is counter not only to the flow of water, but to the nature of that out-of-work list, for a man to go backwards on that list?

A I would not agree with you.

Q Skipping where it's not contrary to nature for water to go backwards --

A I didn't say that.

Q I say skipping that part, tell us why it would be a natural phenomenon for a man to wait a week and slide back a notch on those out-of-work lists if all of the dispatches are being properly registered and done according to the rules of the dispatch procedures.

A It's possible that a man was put back on the list because of reasons -- legitimate reasons.

Q I see. Like a pickup?

A Possibly. That's one of the reasons.

Q Do you see anybody marked "Pickup" on there anywhere?

A No, sir, I didn't check for that.

Q Well, take a second and check it.

A Well, it wouldn't be no use in

[RT 1255]\*

checking it, \* because it wasn't always written there in the first place.

Q I see. Anything other than that; any other reasons besides a possible pickup?

A Well, he could legitimately be somewhere on a court appearance, or he could have been -- anything that would keep him from coming there at the hall and having his name on the week before.

Q Then he'd come in and slip his name back in?

A Not slip his name back in.

Q No, I didn't mean slip it -- well --

A He's legitimately entitled to his position.

Q If a guy goes to the courthouse, subpoenaed into court here, he shouldn't have to lose his position, is what you're saying?

A No, this is true.

Q Yes, but who -- okay, let's assume a man is subpoenaed into court here today, you know, one of the carpenters as a witness in our case, and he's not there on Monday morning, this morning, to sign that book in. Why wouldn't it be a violation of all the rules to have one of the business agents write his name in for him when he had to be here in court?



A I don't think any business agent would write his name in. I don't recall ever doing it.

Q What would happen to the man? He'd have to lose his place, wouldn't he?

A No, I don't think that doing his duty to appear in court would entitle him to be punished.

[RT 1256]

Q How would he get his name in his place, then?

A He would come up and legitimately explain what happened to him.

Now, are we going to dispute the law of the land, say, "You be here, the hell with the court"?

Q I think you've got a real good point there.

Mr. Daley, I'm showing you a copy of one of the white slips for the month of -- from the month of February, dated February 6, 1968, apparently taken at 11:00 a.m., someone whose initials are E. F. That would be Evelyn Folick, wouldn't it?

A I would assume so, yes, sir.

Q All right. Then can you tell me basically what that white slip is asking for?

A Well, this is a request for several men by the City.

Q A telephone work order from a contractor, the City, saying "Send us out some carpenters," and they have requested over the telephone that a certain three or four of them be sent out; is that the idea?

A I would have to screen them.

Q Yes, but that's basically what they have asked for?

A I would still have to screen them.

Q You have to answer "Yes" to the question, or "No" to the question, and then say that.

A Okay, repeat your question.

Q Basically, they are asking you to

[RT 1257]\*

send out certain\* designated men?

A They stipulate what they want.

Q Well, in law it takes two to stipulate, like to tango, Mr. Daley.

A I have to do what the City says. They tell me, they stipulate what they want.

Q That's right, they give you the names of the men they want?

A No, sir.

Q What names appear there?

A These names, James Payne, Austin Solis, George Solis, if available, which I assume that they had worked for the City before. I would assume that.

Q Right. Wouldn't you also assume that somebody from the City got on the telephone and talked to Mrs. Folick and said, "Mrs. Folick, we need four men, and if these four are available, would you send them out to us on the job, and today's the day, and send out these four people," and named the men?

A This could be possible if they had worked for them before.

Q And you say now you'd have to screen these men?

A Would have to screen anybody going for this particular job, if they hadn't been requested by name.

Q But in this case they had been requested by name.

A So I would assume they had worked for the City before.

Q All right. So, in other words, [RT 1258]\*

it's just on the\* telephone requests, is what this is?

A No, not really.

Q This is not a telephone request?

A This is, in all probability, a telephone request.

Q Is an improbability?

A It is, in all probability, a telephone request.

Q I'm sorry, I thought that's what you said.

I'm going to tear off my little handwritten note at the bottom, Mr. Daley. You will be the witness to that's all I am tearing off there; all right?

A I'm afraid my word wouldn't be good. You have to talk to the jury.

Q It would be good for that, Mr. Daley.

Your Honor, may I offer that that be accepted as plaintiff's next in order -- I'll tell you what I will do, I will let you even hang on to that.

THE COURT: That will be 56.

Q BY MR. HOBART: Mr. Daley, there's nothing like getting egg caught on your face by not checking out anything before, but I'm going to gamble.

Mr. Daley, I'd like to direct your attention to the out-of-work sheets of February 19, 1968, and let's locate the name of Richard T. Hill.

Here we go. We see him on page 4, line 2; is that right?

A That's right -- page 4 -- I mean, page 4, line 2, that's right.

Q Now look on that page and the next [RT 1259]\*

page as well, \* and tell me if you see the name of Marion Chavez, the fellow we referred to yesterday as being one of your constant stewards.

A I don't even recall the name Marion Chavez, let alone a constant steward.

Q You don't remember Mr. Marion Chavez?

A Not that I recall, no. No, I don't recall the man at this point, at this moment.

Q Well, maybe he's a stranger to you.

A I wouldn't say that, I just say I don't recall him.

Q Have you been having any memory problems in the last few years?

A I would -- possibly.

Q Okay.

Let me show you what his health and welfare record looks like. See, it says "Mario" here, but his name is Marion. I think that could be just a mistake, but you may know him as Mario.

A I may know the gentleman if I see him by sight, but the name means nothing to me right now.

Q As you can see here, he worked a fair number of hours, didn't he, right along, during your administration?

A Well, I'm not familiar with these sheets, so I can't --

Q Okay. Well, I won't argue with that.



At any rate, you saw Richard Hill here on page 4, line 2, and did you see Marion Chavez anywhere on pages 4 and 5?

[RT 1260]

A Couldn't find such a name.

Q Okay, let's see if you can see him on page 3 anywhere.

A No, sir.

Q How about page 2?

You don't see him there?

A No.

Q Then page 1. I don't suspect we will see him there, either, but we will just look, nevertheless.

I don't see him there, do you?

A No, sir.

Q All right. Now, let's take a look at the next week's sheets. That would be February 26th.

Now, let's find Richard T. Hill again, and if we find Richard T. Hill, we can find him on page 3, now, at line 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 -- 13; right?

A Yes, sir.

Q Now, who do you think we see up here at line 4 on that page?

A We see a Chavez; a M. Chavez.

Q That's right. Do you know of any other M. Chavez besides this fellow?

A I don't know this Chavez.

MR. HOBART: Your Honor, I'm just curious if I can find those other sheets to see how this man's name is written. I think we looked at the two other sheets before, but I can't remember what dates they were in. I wonder if your Honor would have that information, by any chance?

[RT 1261]

Remember, we passed it to the jury, where I asked them to compare two signatures to see if M. Chavez had the same signature. Now, dad-gummit, if I can remember which two pages it was.

THE COURT: Well, maybe we'd better take our morning recess for 10 minutes and see what you can find.

MR. HOBART: Thank you, your Honor.

THE COURT: The jury is given the customary instruction.

(Recess.)

Q BY MR. HOBART: Well, Mr. Daley, back to the books, as they say.

As I recall, we had just discovered that Dick Hill was on page 4, line 2 of the 2-19-68 sheets, and then we went to the 2-26 sheets -- and by the way, on the 2-19 sheets we didn't find the name of Mr. Chavez anywhere, to the best of our collective ability; is that correct?

A That's right.

Q All right.

Then on the next week's sheets, February 26, 1968, we have Mr. Hill down here on page 3, I think I said around line 11, 12, or 13 --

THE COURT: You said line 13 last time.

MR. HOBART: Thank you, your Honor.

Q Now, if you count down 1, 2, 3, 4, 5, 6, 7, 8 -- eight lines above Mr. Hill's name, now who do we find mysteriously appearing?

A Looks like M. Chavez.

Q. Indeed it does.

[RT 1262]

Now, these sheets are made every morning, and then they are left open during the week for people to sign as they may terminate another employment during the week, or otherwise become available for registering for work; is that right?

A They are left available for everybody.

Q Right.

Wouldn't it be a fair presumption to say, at least as to page 3, the first three, four, or five pages, as a rule, they are always completed on Monday morning?

A Usually.

Q Now, isn't it also true it is the responsibility -- I know this is redundant, and I know you already said "Yes" to this once -- but isn't it the responsibility of the business agent to insure that the sheets are signed in the same order from week to week?

A Now, it's the business agent's responsibility, of course, to see that these work -- out-of-work lists are presented, or written in order; but as far as to insure, there's no way a business agent can insure it.

Q I see. He can make mistakes; that's what you are saying?

A Well, of course.

Q Of course, all right.

At any rate, it is clearly an error for Mr. Chavez to be there, isn't it?

A Apparently, it looks as though it's an error.

Q Now, I show you a photocopy of my  
[RT 1263]\*

notation, just\* to save the time of going through the files there; but you see on February 29th, 1968, Mr. Marion Chavez was dispatched by you to the William Simpson job on 800 West 2nd Street; isn't that right? I can get the original one out --

A No, it shows this is a work referral, and it shows that I evidently dispatched him.

Q Okay. He wasn't a request, was he?

A I have no way of knowing.

Q Well, you didn't write "Request" anyway, did you?

A Certainly didn't.

MR. HOBART: And, your Honor, I do have Mr. Chavez's health and welfare record here, which indicates that he worked for the

William Simpson Company in February 1968, working for them for a total of 16 hours, and ask that that be plaintiff's next in order.

Q Now, Mr. --

THE COURT: Just a minute. That Health and Welfare Trust record for Marion Chavez will be received as exhibit 57.

You say it shows --

MR. HOBART: Yes, your Honor, for February of 1968 it shows 16 hours at Simpson & Company.

THE COURT: Yes.

MR. HOBART: If I may have that back, I may ask another question on it, your Honor.

THE COURT: Yes, that would be No. 57.

MR. HOBART: Thank you, sir.

Q Mr. Daley, aside from just trying to help a friend out and keeping him employed,

[RT 1264]\*

can you think of any\* reason why a man who had been working regularly -- by regularly I mean the following -- I'll just pick it up, say, October of '67, 154 hours; November, 152 hours; December, 56 hours; January, 99 hours; and



then some other part in February, probably before the 29th, he had worked 72 hours for the Vinnell Company -- is there any reason why you can think of, sir, that a man who has been working this regularly every month would be given a dispatch to the William Simpson job, when apparently others are ready, willing, and able to work?

A I have no explanation at this particular time for what you are saying, any more than I have for his name being on the list.

Q By the way, just so that we know, the dispatch sheet showed that he was dispatched on the 29th of February; is that correct, sir?

A Yes, sir.

Q The health and welfare record indicates that he also worked in March another 24 hours, then sometime in March he transferred over to the R. J. Daum job.

You have no explanation as to why he kept working here and there, and appeared on the list at this time?

A No, sir, I have no explanation whatsoever for that.

Q All right.

Now, we indicated that Mr. Chavez had not been on the February 19th list, but he was

on the February 26th list.

[RT 1265]

Just for fairness, let's just see if he was on the February 12th list, and again, we can use Dick Hill's signature, I suppose, as a starting point, inasmuch as he appeared slightly above Mr. Hill on February 26th.

So here's the February 12th list, and Mr. Hill is on page 4, and going up from there, do you see his name anywhere -- Mr. Chavez's name anywhere?

A No.

Q How about on page 3?

A No, sir.

Q By the way, did you ever knowingly allow any of the Mexican or Mexican-American fellows, such as I see this Robert Lopez, to sign any other person's name, with your permission?

A I wouldn't allow it, no, because to us it was a -- well, it just wasn't done. We didn't allow it whatever, no more than we'd sign the name of a person ourself.

Q All right. Now, I had passed around a document the other day showing Mr. Chavez's name on it, and I thought possibly it was spelled in two different ways, recognizing

it's a close question; but do you see Mr. Chavez's signature on the sheets of 3-18-68?

A Yes, sir.

Q And you see the signature of Mr. Chavez on the sheets of 3-25-68?

A Yes, sir.

Q All right. You can see that there's some difference, but I suppose neither you nor I

[RT 1266]\*

are really qualified to give\* an expert opinion on it. Would that be fair?

A I would say I'm not qualified, no.

THE COURT: Is that 3-25 or 2-25?

MR. HOBART: 3-25-68, your Honor.

Q And now let's take the sheets that we have just been referring to, the 2-26-68 sheets and let's add that one to it, and now you see Mr. Chavez's signature here?

THE COURT: Page 3, line 4.

MR. HOBART: Yes, your Honor, on page 3, line 4.

Q Do you see his signature there?

A Yes, sir.

Q Wouldn't you agree that there is a gross discrepancy between the last one, the one on 2-26-68 --

A I'm sorry, I can't answer that, either, no more than for this one than I could for that one.

MR. HOBART: Your Honor, I wonder if I could pass these three sheets, just in this order. I can put a red dot on them. I'd like the nature of the signatures to be brought to the jury's attention.

THE COURT: All right, put a red dot on it.

MR. HOBART: Thank you.

THE COURT: Do those exhibits have numbers?

MR. HOBART: I do not believe they are  
[RT 1267]\*

yet, your Honor,\* but I intend to offer them as soon as they are through.

THE COURT: All right.

Q BY MR. HOBART: Mr. Daley, if indeed Mr. Chavez was not entitled to be on

page 2 of those sheets, and got dispatched from those sheets from being that high up, he'd be called a sneak-in, and that would be an illegal dispatch, wouldn't it?

A I would -- I would agree with you that he might be a sneak-in, yes, sir; but not as an illegal dispatch.

Q I see. The sneak-ins can sneak-in, but once they are dispatched, they are not illegal?

A They might be dispatched wrongfully, but not illegally, because if we knew it, we would correct it.

Q Mr. Daley, I'm going to show you a document, and ask you to be kind enough to -- actually, it's a photocopy of two different documents. You can probably tell, can't you?

THE COURT: What is it you want Mr. Daley to identify?

MR. HOBART: Yes.

Q Just tell us what the documents are. Can you identify that document, Mr. Daley?

A Well, I don't recall seeing this particular type of document, but to my mind, it seems like a work request from the company.

Q Okay. Now, that would be a work request from what company?

A R. J. Daum Construction Company.

Q And would you agree with me that

[RT 1268]\*

that it looks like it\* was two different documents, and they have just been photocopied together?

A They would appear to be, except for the names Whiteneck and Buettner -- Butler. There's two different names, sir; Gary Whiteneck and George Butler.

Q What I'm talking about, is that when I photocopied these I took this memorandum, and I took this memorandum, and I put it on one; put it together and photocopied it so it came out one.

In other words, you can tell by looking at it -- you can even see the line across here-- that one time it was two different documents?

A This is what I would say, that it is two different documents, although the same date.

Q Of course.

Let's just label the top one, A, the bottom one, B.



Okay. Now, for document A, document A requests what information; what kind of assistance on what date?

A February 22nd of 1968:

"Please issue a clearance to Gary Whiteneck 2nd per. apprentice to work on Belmont High School, 1575 W. 2nd St."

Signed, "Thank you" -- I believe it's R. W. Alexander.

Q Okay. What did the second document request?

A That is February 26, 1968:

"Subject: Please issue a clearance to George Butler for Belmont High School, 1575 W. 2nd St."

[RT 1269]

Q Those are just two typical requests for the Belmont High School?

A No, sir. This is a completely different document. The first one read for an apprentice.

Q Okay, but it was a request for an apprentice?

A That's right, a second period apprentice.

Q The second document was a request for a carpenter?

A For a carpenter -- I would imagine it's for a carpenter, because it is addressed to Local 25.

Q Okay. I would imagine it is one, too. All right, we will go on from there.

That's Mr. Butler, the second one?

A That's what it appears to be.

Q George Butler, now, on the 26th, did you find there a dispatch for Mr. Butler?

A Yes, sir.

Q And it's indicated on it as a request, is it?

A It is.

Q And here's the request you made out for Mr. Whiteneck; is that correct?

A Yes, sir.

Q So when you got these two requests, these two written requests in, you sent out these two men pursuant to the requests; isn't that fair?

A Yes, that's true; but, again, the word "Request" is something for our personal records, not necessary.

Q I know, but even though it's not necessary, you wrote it down on both of them?

[RT 1270]

A That's right.

W Mr. Wilk did on one and you did on the other?

A Yes.

Q And, again, you had both been dispatching the same morning?

A Right, but the apprentice is not governed by the same rule.

Q I realize that he get a different amount of money --

A No, he's dispatched differently.

Q In other words, there is a written request for him, and you sent him out and wrote the word "Request" on the sheet, and there is a written request for Mr. Butler, and you sent him out and wrote "Request" on the sheet?

A Yes.

Q Now, here in these documents -- remember the documents that we admitted yesterday, the ones that I testified that I had photocopied, and we went through them, and then identified all the requests, and everything?

A Yes.

Q You recall those. Let's see if these two requests show up there.

THE COURT: Is this exhibit 50 you are looking at?

MR. HOBART: Yes, your Honor, I believe it is.

Yes, your Honor, plaintiff's exhibit 50. These would be the employer requests and the white slips, the photocopies taken by me.

Q Now, directing your attention to

[RT 1271] \*

the third page\* of these requests, you notice that under the employer request forms, the request for the R. J. Daum Company that we have just been referring to are not commented on, because they are not on the standard request form, are they? That's a kind of a makeshift?

A The company has either run out of them, or else they used this method to carry on their business.

Q Right. Could even be a "widda" block?

A A widda block?

Q A block of wood. All right, we will get it.

Now, going down the list, we do see that for 2-26, Daum requests two people, Gary Whiteneck and George Butler; right?

A Is this from the company, again?

Q Yes.

A Or did you type this?

Q No, I typed this up, but I typed it after reviewing all of these documents.

A Yes.

Q Okay. You can see this is reflected on here?

A Yes, sir.

Q All right.

Now, I'm going to show you another dispatch made on the same day, in which you dispatched a man by the name of W. O. -- what's his name? Do you recognize that?

A My writing must have been very bad that day. I can't read it.

Q All right. Well, it's W. O., We'll

[RT 1272]\*

say Yosthon or\* Yosthom. I see an o-s. It looks like a h-o-n, or h-o-m; but at any rate, his initials are W. O.; right?

Is that right?

A Oh, yes, yes.

Q Now, Mr. Daley, you indicated on that same day that we have these two written requests, that this man was a request. It says, "Request, CL"; request clearance.

Now, can you tell me, where did you get that request?

A I'm a little bit confused, but his could be -- this could be a telephone request, or a follow-through request by telephone. But I'm a little bit confused here. Are these the same job?

Q I don't know, you will just have to tell me.

I see there are no written requests.



A I don't know whether these are the same job or not, although they are the same date. One is 1575 West 2nd Street, and this one is Beverly and Loma Linda Drive -- Loma Drive.

THE COURT: Well, I can take judicial notice that they are adjacent.

THE WITNESS: They are very close together.

THE COURT: Yes.

THE WITNESS: Then it would appear they are from the -- oh, well, there's not a request form here, as far as that goes. This is not a request form, this is a job clearance, again.

Mr. Hobart, this is not a request, this

[RT 1273]\*

is a job\* clearance, and therefore, it indicates a steady employee.

Q BY MR. HOBART: It says "Request" there?

A No, it doesn't, it says job clearance; request clearance.

Q All right.

A Which indicates an employee of steady nature.

Q Well, how does it indicate that, Mr. Daley? On many of your requests you have written "Request clearance."

A Well, that's true.

Q You wrote "Request" in many cases.

A It was my little practice, whenever I thought about it, to clear a man for a job because he was a steady employee; but on a request, there's different problems involved.

Q Mr. Daley, if this man was being requested for this job, to have himself cleared, why wouldn't he just have been included on one of these?

A As I said, he's possibly a steady employee.

Q You raise that as a possibility, but beyond that as a possibility --

A I'm quite sure that that would be the reason.

Q What do you mean, if he was a steady employee?

A In other words, he worked for the company steadily, and that rather than the superintendent or foreman requesting him, he was

really asked to clear for the job, which automatically gave him a work referral.

Q Who asked to have him cleared for the job?

A I wouldn't have any idea who

[RT 1274]\*

requested him, but\* generally it would be a person in authority.

Q And that person in authority, who writes requests for some of his men, you say doesn't write requests for this one particular person?

A No, I didn't say that, sir. I said if he wrote this here as two requests, which they are, this one here is a clearance request for the employee who is steadily on their payroll, and therefore, he's entitled to a job clearance. In other words, he was transferred from this job to this particular job.

Q Why doesn't it say job transfer or rehire?

A I'm sorry, Mr. Hobart, but, see, it doesn't require you to spend your entire day keeping notes on requests, and all that sort of thing, because I wouldn't be able to get out in the field.

Q A rehire is one of the most common words you have used.

A Yes, but I wouldn't write it.

Q You have written it before.

A Not rehire.

Q Not?

A Not that I know of.

Q What about transfer?

A Never wrote it. That's too long. That's much longer than rehire.

Q Well, okay.

Aside, then, from the one possibility that he was being -- that this was an oral request,

[RT 1275]\*

this fellow, you\* don't know what the dispatch situation with him was?

A Well, being a clearance, about all that was required of this gentleman to get a work order was a check stub.

Q I gather from what you say these men go around with these check stubs bulging out of their pockets so they can have them handy for

you whenever they get around?

A I wouldn't say bulging, but most of them have a knowledge of what they are required to do, so they have at least a recent check stub in their pocket.

Q Do you recall if he had a recent check stub in his pocket?

A No, sir. No, I wouldn't. I wouldn't recall.

MR. HOBART: Your Honor, I would ask that the two requests of R. J. Daum, and the three dispatches to the R. J. Daum of 2-26-68 be admitted as plaintiff's next in order.

THE COURT: All right, 58.

Do you want to staple them?

MR. HOBART: Yes, I have clipped them, but they probably should be stapled, your Honor.

THE COURT: All right.

MR. HOBART: Next I'd like to introduce your Honor, the out-of-work sheets for April 18, 1968.

THE COURT: April 18th?

MR. HOBART: I'm sorry, we can do this in better order than that. February 26, 1968 --

THE COURT: The first one was February 18th, wasn't it?

MR. HOBART: No.

[RT 1276]

THE COURT: That's the one that doesn't show Mr. Chavez on it. All right.

MR. HOBART: Well, I'm not sure -- yes, Chavez is shown on all three of these.

THE COURT: All right. Which was the first one chronologically?

MR. HOBART: I'll give it to you in chronological order. February 26, 1968; March 18, 1968; and March 25, 1968. I would ask that they collectively, along with that dispatch of Marion Chavez on March 29, 1968, which is appended thereto, be admitted as plaintiff's next in order.

THE COURT: All right, you staple them and --

MR. HOBART: I have a clip on there, your Honor.

THE COURT: I see. All right, this will be 59.

Q BY MR. HOBART: Mr. Daley, when you receive a request, we'll say an oral



request for a man, and that man is not available for one reason or another, is not in the hall when the dispatch goes out in the morning, or he doesn't want the job, or he's ill, or whatever, then if you have to dispatch somebody else -- in other words, if the guy says to you, if the order giver says, "Mr. Daley, tomorrow we need one forms man. Send me Joe Smith, if he's available." Now, if Joe Smith isn't available, then is it within your prerogative to just send him anybody else you want to, or would you have to then revert to the unemployment list?

A Well, it depends upon how the request was worded. In other words, if he wanted a particular man, and this man was not available,

[RT 1277]\*

and he didn't request a man in his place\* if he was not available, then I had no right to send anybody.

Q Okay. But suppose he gave you a request and said, "Send us Joe Smith if he's available," but leads you to believe if he's not available, then you've got to send somebody, because they've got to hammer in some nails, or something.

A What do you mean by "leads me to believe"?

Q Tells you.

A In other words, a request, and if there is one available, and if he's not, then send him a man, anyway?

Q Right. That's right.

A Under those circumstances I would have to go by the book.

Q All right.

Now, according to the white slips that I copied down at the union hall, you will notice that I made a notation -- which I will find for you in a moment -- June 4, 1968, Austin Company requests a man by the name of Arvin Mayfair. Do you see that?

A I read it, yes, sir.

Q All right. Now, you did send somebody to the Austin Company on 6-4-68, but as you see, you sent Mr. Ed Burge; is that right?

A Right.

Q All Right. Now, my first question is, if you will assume, and I will represent to you, and I am under oath, that I copied down everything that was on the pink slip, if you will assume that

[CT 1278]\*

I wrote down everything there on the\* white slip,

have everything that appeared on that white slip, wouldn't you say if Mr. Arvin Mayfair had not been available for work it would have been your responsibility to go to the books, the out-of-work sheets, to get the man, or do you feel that you had some other authority to get that man?

A I have to state right now that the job request for this Arvin Mayfair, who I do not know -- you evidently copied it off of the records --

Q That's correct.

A -- and the request for Ed Burge could have been a later development by telephone, or even coming in and -- and with a little business card, stating, "Please clear the bearer for this job."

Q Well, at any rate, among the possibilities, Mr. Daley, one thing is for sure, that you put down there Mr. Burge was a request, and what does the name Anthony DeRoes mean on it?

A It could have been that that was the foreman that requested him.

Q Do you know if it was the same foreman that requested Arvin Mayfair?

A I wouldn't even know if it was the same foreman, or anything; but the only name I'm familiar with in a slight way is Ed Burge,

and Arvin Mayfair I have no knowledge of whatsoever.

I remember Ed Burge, because I think he's a long-time member there, and on the outside of my political fence.

[RT 1279]

Q Would your position be that he had necessarily come from the top of the list, or he may have come from anywhere?

A He didn't necessarily have to be on the list at all.

Q If he was a request?

A Right; or clearance, either one.

Q All right. Now, with respect to the same day you had a request from a Mr. -- or from a company by the name of E. A. Dotter -- and some of my spelling may be wrong, because I couldn't read it sometimes -- but he requested one forms, and then in parens, a man by the name of Carroll Rei. Do you remember Mr. Rei, R-e-i?

A As far as I'm concerned, neither one of these belong to my local. They belong to another local out of there somewhere, so I would have no knowledge of it.

Q Well, he certainly replaced Mr. Mayfair with somebody out of your local?

A No, sir, I said I didn't recall Mr. Mayfair at all. I didn't recall Mr. Rei. I have a slight knowledge of this man Mr. Burge, and that's all.

Q You say Mr. Mayfair is not in your local?

A I wouldn't say that. Not to my knowledge, he's not in my local.

Q And I said you replaced him on that job by someone who was in your local.

A I didn't replace anybody here, Mr. Hobart. In all fairness to everybody, this

[RT 1280]\*

man could have been dispatched\* or not dispatched, he could have been dispatched and not showed up for the job, or he could have been dispatched and showed up for the job, or he could have been a clearance by Mr. Anthony DeRoes. To go back five years to pinpoint a certain source of information, no; but the only thing I say is if Mr. Arvin wasn't dispatched, he wasn't available. If he was available, he was dispatched.

Q All right.

Now, with respect to this request by Dotter, requesting one forms man, Carroll Rei, now, I couldn't find any dispatch slip for Carroll Rei.

Let me just give it one more look. That was for 6-04?

A Yes.

Q Well, I can't find a dispatch for Mr. Carroll Rei to the Dotter Company, but I can find a dispatch for a Mr. Milton Taylor of Local 25. That's your local, isn't it?

A I believe it is, yes.

Q You sent him out to Dotter as a request.

Now, Mr. Dotter requested Carroll Rei. What gave you the authority to say that this Milton Taylor was a request?

A Well, we're going to have to go back to one of your questions just a few minutes ago, that if this man was requested by name, then if he wasn't available, this particular man, then there could have been a request for Milton Taylor verbally.

Q Don't you think that would have been noted at the same time the original white

[RT 1281]\*

slip is made, "Send us Carroll\* Rei, or if not available, send us Milton Taylor"? Isn't that the most likely possibility?



A Not really, Mr. Hobart, because as I say, the bookkeeping -- we're just carpenters, we're not bookkeepers, so we would refrain from as much writing as we could.

So this Milton Taylor and Carroll Rei incident, it could have been an oral request, and that Carroll Rei, not being available, the next man, or whoever he is, Taylor, was dispatched by request, as an oral request.

Q Do you have any indication that Mr. Taylor was requested by anybody besides yourself?

A Besides myself?

Q Yes.

A I haven't any indication that any of these gentlemen you've got written down here were requested.

Q You have only my word for it, under oath?

A I have your word for it.

Q And you also have the fact that I have introduced into evidence photocopies of some of the documents?

A True. When I see these, I recognize their legitimacy, yes.

Q They are all from the same source, Mr. Daley.

My point is, Mr. Daley, when you indicate that a man is a request, isn't it true that you have just sent out to work a man that you wanted to send out to work, and since there had been an original request, just mark the next one a request, and that way nobody gets any heat on your back for sending out an illegal dispatch?

[RT 1282]

A That wasn't my procedure.

Q Mr. Daley, you told us that time after time you don't keep this record, and you don't keep that record, because there's no rule, no law requires it, you're carpenters, you're not businessmen, it is unimportant, you don't have to keep records, you throw them away, all this sort of thing, all that sort of thing. Is that basically an accurate statement?

A Inaccurate or accurate?

Q Accurate.

A Well, no, I don't say basically accurate. It's a little bit slanted there, Mr. Hobart. You're playing us out like a villain. I did whatever my job required to be done.

Q Does your job require you to write "request" on any of your request dispatches?

A No, it doesn't require it.

Q You say you do sometimes, and not sometimes?

A Sometimes yes and no.

Q If you don't have to do it at all, why do you do it in some cases?

A It's sort of a little historical date that we keep. If we have to go back a day or two, then it's in the records. Beyond that, no.

Q Isn't the same true if you have an oral request, you should write that down so you can go back?

A In all fairness, I would write down request in all cases, but sometimes I didn't because I didn't think it was necessary, or I forgot it completely.

Q All right.

[RT 1283]

Now, Mr. Daley, from January of 1967 up until the day you stepped out of office, at least one person, and probably more, but at least one person was charging you with constant illegal dispatches, wasn't there?

A There was one person at least, yes, guess so.

Q That person was Richard Hill, wasn't it?

A Constantly.

Q All the time charging you with that?

A Constantly.

Q Did he threaten --

A Socially, constantly. Every time we met, he constantly -- while we were drinking, he constantly accused me of doing things.

Q He would tell you that that dispatch procedure had just become a shambles, a joke, and that it wasn't worthwhile, things of that sort?

A According to Mr. Hill that was his theory and that was his opinion.

Q And he told you he was going to the District Council of Carpenters, and he was going to file charges against you, didn't he?

A I think, if I recall, he was going all over the country to file charges against me.

Q And to your knowledge, he did go to the District Council of Carpenters, and did file charges?

A You say to my knowledge. No, sir, I don't recall it.

Q You don't recall him ever filing  
[RT 1284]\*  
charges against\* you?

A No, sir. I was never called into the District Council to answer any charges.

Q Did any member of the District Council of Carpenters ever come over and investigate the dispatch procedures?

A I have had the District Council come over and go over them, but as far as -- they'd stand there and watch the dispatch procedure.

Q But as far as an investigation, did they ever do that?

A Not to my knowledge, no.

Q But, in other words, during all of this time, Hill told you he was even going to take you to the NLRB, didn't he?

A I've heard so many things in that vein from Mr. Hill that it's quite possible.

Q And Mr. Hill did, in fact, file charges, and did take you to the NLRB, didn't he?

A That's right.

Q And before the NLRB they went and took a batch of these records, and you had to explain somewhat similarly as you are doing here; isn't that true?

A Somewhat, yes.

Q Now, with all of these charges going on, your reputation at stake, reputation of the union at stake, possibly money of yours and of the union, International Brotherhood at stake, didn't you think, sir, that that was sufficient reason for you to again start making some legible notations and records with respect to your dispatch procedures?

[RT 1285]

A I didn't think so, because there was no base of foundation whatever in any of these charges.

Q The NLRB disagreed with that, didn't it?

A That was the opinion of the NLRB.

Q But you didn't feel that the fact that he had made these charges, and the fact that these charges were going to be reviewed by men of authority, people in authority, you didn't feel that it meant you were going to have to establish certain consistent practice, such as always



writing a request, if it is a request, or never writing it? You didn't change any of your practices?

A My basic practice was always honest, and to change it because of a fallacy and accusations that had no basis of fact in them, that would be against, almost -- against nature.

I trusted my honesty, and I felt that the accusations of Mr. Hill were completely erroneous, and so I felt no alarm about this -- not too much alarm, anyway.

Q Mr. Daley, not to actually subject ourselves to it, because it would be time-consuming, but let me just ask you to pick out a month, just any month -- what's the month of your birthday, or wife's birthday, or something.

A Let me check. I think it's July.

Q All right, let's just take the month of July.

Mr. Daley, I have in front of me the carpenter requests for July of 1968.

Do you remember yesterday we went through carpenter requests for the month of February 1968, and we found so many of the dispatches that said "request" on them were

[RT 1286]\*

not, in\* fact, verified by written requests, and you said, well, possibly they were oral requests. Do you recall that?

A Oral or phone call, and that's what you claim was the same thing.

Q All right.

A They could have been in-person oral requests.

Q Yes, okay.

Now, Mr. Daley, if we took the dispatches -- just to make things easy, would it embarrass your wife too much if I took the next month?

A Embarrass me -- what did you say?

Q Could I take the next month, August, without having you think I'm running a ringer on you?

A I'm sure you wouldn't do any harm to me that way, intentionally.

Q I'm sure not; but I do have the August dispatches which I couldn't find for July. They are around somewhere, and I have the August '68 requests.

Now, do you think the figures, if we went through these one by one, do you think the percentages would be just about the same as they were in February, when we found there are a good number of people marked requests here, but the requests don't show up here? Would you think that would be just about the same percentages?

A The circumstances that you're revealing here are not the same, so the question can't be answered that way.

Q All right, you tell me how the answer can be -- the question can be answered.

[RT 1287]

A Well, there's so many possibilities. When you say requests, you're not talking in terms of one or two or three or a hundred. There are some times when we have as high as seven or eight hundred a month.

Q I don't quite understand what that means with respect to the question.

A I mean we clear men through the local in various manners and various ways, and to come out and say -- well, I say we dispatch through the hall, through the -- in the ordinary routine of business, some months as high as six or seven hundred men.

Q All right. Well, for the month of August, apparently you dispatched -- August of '68, you dispatched about this many.

I'm showing you the work referral slips, and they are about an inch high altogether when they are pressed.

A All right.

Q That's probably two, three hundred, somewhere around there, wouldn't you say? A couple of hundred, anyway.

A I'll take your word for it.

Q All right. My question is, if we took the time to go through these to see whether all of the requests that are here in the request lists have been marked "request" here, do you agree that we would find a number of people marked requests in this list whose name does not appear over here in the written request forms?

A These written request forms may

[RT 1288]\*

come into play and\* they may not. The company has them on file.

Sometimes they run out of them, and therefore, it's not very serious, so they write a request on anything; but sixty percent of our

people are working, and they are steadily employed by contractors throughout the country.

Q When you say they run out of request forms and they write it on anything, they write it on such documents as those as we have here, just little scraps of paper, mementos, anything?

A Business cards, blocks of wood.

Q I can only represent to you that this is what your union officials have brought in to us. I didn't bring them in, so I would assume they are as much as they've got. Wouldn't you agree with that?

A Yes, sir.

Q All right. My question is, again -- maybe you can answer this yes, or maybe you can answer it no -- if we went through the requests and we found a corresponding work referral, wouldn't you agree that at least 95 percent of the work referrals would have the word "request" on it? That's point one.

A I never went -- I never got the question put to me before. I can't say. No, I wouldn't be able to say that, no.

MR. HOBART: Your Honor, I wonder if it would be possible to break at this point, and I will do this during the lunch hour.

THE COURT: I was just going to suggest

[RT 1289]\*

that probably it\* would relieve the tedium of the jury if you do that.

MR. HOBART: I wish I could relieve the tedium myself, but I'll do it during the lunch hour.

THE COURT: All right.

Well, we will recess now until 1:30 this afternoon, and the jury is given the customary admonition.

MR. GEFFNER: Your Honor, can we go into chambers for a minute?

THE COURT: Yes. Do you want the reporter?

MR. GEFFNER: Yes.

(The following proceedings were had in chambers:)

THE COURT: Yes, sir.

MR. GEFFNER: Well, your Honor, I wanted to go on record at this time, because I didn't want to constantly pop up and interrupt Mr. Hobart's cross-examination of Mr. Daley, but I do want to state that I have a continuing



objection, with your Honor's permission, to the constant referral by Mr. Hobart in his, I'd put it, wanderings around the dispatch records over the period of over two years; that selecting names at random, trying to compare signatures, questions as to what type of requests, and so forth, that none of the items, with possibly one or two exceptions, is there any tie-in with Mr. Hill in any way.

And my objection is, one, on the grounds of relevancy; but secondly, on the grounds that what Mr. Hobart's attempting to do is, in effect, try the dispatch procedures before this jury and court of Local 25, without any tie-in to Mr. Hill, and that this is exactly the type of procedure

[RT 1290]

that is the basis for the pre-emption doctrine, that the matter belongs within the expertise of the National Labor Relations Board.

The state court and the jury is not in a position of evaluating the accuracy or the businesslike efficiency or the fairness of the hiring hall of a construction union that is involved in interstate commerce; and again, rather than objecting constantly, I would like the record to show I did have a continuing objection to this type of questioning, as well as the introduction of exhibits which are picked out of names at random, which have been picked out for any month during the two and a half year period.

THE COURT: Well, your objection is -- of course, the court appreciates your helping expedite this matter, as you have, by not constantly objecting, and I think Mr. Hobart probably is about through, aren't you?

MR. HOBART: Yes, your Honor, I am. I'm just about done with Mr. Daley, except for some specific conduct between him and Hill.

You see, the problem I've had is Mr. Daley denies that he's ever done any wrongdoing in the dispatching. Mr. Geffner asks Mr. Hill if he can name even one illegal dispatch, and I'm just -- I'm limited as to showing when there were some illegal dispatches, inasmuch as inconveniently for us, some of the records of the time period most desirable are omitted; so I have to show by inference if it was done here, then inferentially it was done there, and that's the reason I had to do that in 1968, because

[RT 1291]\*

we don't have the records\* for 1967.

THE COURT: Well, I suggest you go out and work on the matter that you selected so that we can either have it tabulated or summarized to the jury.

MR. HOBART: That's what I will do.

THE COURT: Then let's get on to your specific contacts with Mr. Hill; between Mr. Hill

and Mr. Daley.

MR. HOBART: Because I don't have much more as far as records are concerned.

THE COURT: So I will continue overruling the objection.

MR. GEFFNER: Well, I --

THE COURT: I will allow it. It is agreed that it continues as a running objection to this line of testimony.

MR. GEFFNER: Yes, I just wanted to emphasize, your Honor, that I understand your Honor's ruling, but that to merely throw in a series of names as to whether their slip was marked request or not request is absolutely no proof that they were in any way dispatched out of order.

THE COURT: Well, it may be, but that's a matter, I think, for argument, and we will see.

We will see how Mr. Hobart hooks it up in his summation, and if it gets to the jury, how the jury treats it.

So let's go to work on these things and try to button it up this afternoon.

(Whereupon, the noon recess was taken until 1:30 P.M. of the same day.)

[RT 1292]

THE COURT: All right.

MR. HOBART: Thank you, your Honor.

Your Honor, I had reference to these two documents, a work dispatch for Mr. Ed Burge, which had originally been a white slip request for Arvin Mayfair, and I ask that that be admitted as plaintiff's next in order.

THE COURT: All right, that will be 60, and that's June --

MR. HOBART: 4.

THE COURT: All right, that is 60.

MR. HOBART: And as 61 I would request the work referral slip to Milton Taylor, who came in on a white slip request for a Mr. Carroll Rei, dispatched on 6-4-68.

THE COURT: That's that Dotter?

MR. HOBART: Yes, your Honor, I think so.

THE COURT: All right.

MR. HOBART: We will see if we have some more 1967 --

Q. Mr. Daley, let's see how many of these we have in order for the first three months of 1967.

We've got January 9, January 16, January 23, January 30; February 6, February 13, February 20, February 27; March 6, March 13, March 20, and March 27; so that should give us the first three months pretty complete, shouldn't it?

A Yes.

Q Now, Mr. Geffner asked whether Mr. Hill could point out one illegal dispatch in those three months of 1967. Let's see if you and I can't find some.

[RT 1293]

Now, keep in mind what records we have to work from, and if you know of some others, tell me. As far as I know, all we have to work from are the out-of-work sheets themselves. I know of no work referral --

THE COURT: This is the first three months of '68?

MR. HOBART: '7, your Honor.

THE COURT: '67?

MR. HOBART: That's right.

Q I know of no work referral slips themselves. I know of no white slips, and I know of no orange or employer requests.

Do you know of any for that period of time, those first three months of '67?

A I wouldn't have the least idea that far back.

Q All right. So to determine whether there had been any improper dispatches, we're somewhat limited, wouldn't you say, without these additional records?

A I didn't hear you.

Q I said, in order to make it an accurate determination as to whether there were any improper dispatches in those first three months of 1967, we are somewhat limited in that we don't have much in the way of records.

A I don't know how to answer you there. That's your supposition.

Q Okay. You'd say we are somewhat limited in our records? Would you say that?

A You say that.



Q You'd say that, too, when you can't

[RT 1294]\*

see anything\* more than that in front of you, wouldn't you?

THE COURT: Well, I don't think we are getting anywhere here.

MR. HOBART: All right, your Honor.

Q Mr. Daley, if you would take a look at the sheets of 2-6-67 --

THE COURT: These are the out-of-work sheets?

MR. HOBART: Yes, your Honor.

Q Have you got those sheets? All right.

Now, to begin with, Mr. Daley, taking a look at those sheets of 2-6-67, tell me if you find the name of Mr. A. Walker.

A In a particular sheet -- I mean, page?

Q Yes -- well, I'm going to have to help you with that. We're going to have to run through it together, because unfortunately, time didn't permit me all the details that we wanted.

Mr. Hill is on page -- well, I'll show you where Mr. Hill is when we find Mr. Hill. Let's just go down looking for A. Walker and Richard Hill, how's that?

Okay, here's Richard T. Hill on page 6. See him?

A Uh-huh.

Q He's down about line 16.

A 17.

Q 17? There's 21 lines.

A Yes. Got five below him.

Q If that's 16, 17, 18, 19, 20, 21, so he's on line 16. Okay?

[RT 1295]

A Uh-huh.

Q So Hill is on page 6, line 16.

Now, Mr. A. Walker, just keep looking for him over here, see if he doesn't show up sooner or later.

A Well, you're going pretty fast. I'm not as fast as you are.

Q Okay.

THE COURT: Haste makes waste.

MR. HOBART: Indeed it does.

Q Well, by George, here we go, Albert Walker. See him there?

A Yes, sir.

Q He's on page 15, isn't he?

A Uh-huh.

Q He's at line 18?

A 18.

Q Line 18.

Now, there's no dispatch listed after his name, is there, on that?

A No.

Q We know that Mr. Walker got dispatched, Mr. Daley, because I happen to have a copy of the Carpenters Health and Trust, and you will see that in February of 1967 he was dispatched to Swinerton & Walberg, and he worked 67 hours at 420 South Grand Avenue. Do you see that?

A Yes.

Q All right. Inasmuch as these records do not indicate the date of the dispatch,

[RT 1296]\*

we just know that it's\* 2-67, Walker, A. Walker, dispatched to Swinerton & Walberg, and he got 67 hours.

And we also know that Hill, above him on the lists --

A Is this supposed to be this request?

Q Well, you're going to be able to get an opportunity to say which of these were and which ones weren't at the appropriate time. We will just go through them right now and see what we have.

Your Honor, I'd offer Mr. Walker's health and welfare record into evidence, indicating that he was dispatched on that occasion.

MR. GEFFNER: Your Honor, I object to the reference of dispatch. There's no evidence of him being dispatched.

THE COURT: It's evident that he did -- or there was a quarter for him, 67 hours of earnings at Swinerton & Walberg in the month of February, 1967.

And that's the document you want me to mark into evidence?

MR. HOBART: Yes, your Honor.

THE COURT: It will be received as 62.

MR. HOBART: I will need it back, your Honor. There's also one other one off of that.

THE COURT: Yes.

MR. HOBART: Thank you.

Q Now, turning our attention to the sheets of March 6, 1967, I will again have to start looking for Mr. Walker.

But to begin with, we know that Mr. Hill is on page 3 at line 7. Do you observe that?

[RT 1297]

A You mean you're looking -- still looking for Walker?

Q Right now I'm looking on March 6, 1967; correct?

A And you're looking for Albert Walker?

Q Yes, but before we do, I just want you to take notice that Mr. Hill is on page 3 at line 7. Is that fair enough?

A Fair enough, but I'm confused, here. Are we still looking for Mr. Walker?

PAGINATION ERROR

TEXT IN SEQUENCE



Q Yes.

A One week -- or one month after he was dispatched, supposedly?

Q Sometimes these people show up just all the time, Mr. Daley.

A Well, I just want it clear, you see, because I was a little confused here.

Q All right. Well, I'm going to show you the health and welfare record. I am going to give you the inside information just a little ahead of time.

You see that he was dispatched to Swinerton & Walberg, and the, sure enough, one month later he was sent off to a four month job to Pozzo Construction Company, wasn't he, so let's --

A Well, can I ask you a question, sir?

Q You certainly may.

A Do you have the dispatch orders for them two jobs?

Q Mr. Daley, I never had them, ever, and I only wish that I had. The answer is no, sir.

[RT 1298]

A Well, can I ask you another question?

Q Surely.

A It's assumed that he was dispatched from Local 25?

Q That's an assumption that I'm making, but you and your counsel have all the vast facilities of the carpenters' records, and you can rebut that presumption when it's your turn. Fair enough?

A Well -- fair enough, but I'm a little confused at the way you're going about it. I just wanted to clear my head about it.

Q Anytime you want to get your head cleared, just let me know and we'll try to clear it.

Now, we know Mr. Hill is on page 3, line 7. Now, let's look on down and see if we can find Mr. Albert Walker someplace on these lists again.

I realize I'm going faster than you, but believe me, I've done this so many times that I'm almost the world's greatest expert at it.

A I'll give you a job in the Local 25's dispatch office.

Q If I lose this case, I may need it.

Okay, Albert Walker, page 8, line 2; is that right?

A Yes.

Q So Walker's at page 8, line 2. You'd concede that certainly is well behind Mr. Hill; isn't that right?

A Sure.

Q All right. Now, on that date, or at some date around that date, because we don't [RT 1299]\*

have the exact day off of\* here, but some date in March of '67, Mr. A. Walker was dispatched to Pozzo Construction Company.

He worked on that job for a total of, let's see, one, two -- 705 hours; and, again, Hill is above him on the lists.

That's all we have on Mr. Walker today. I'll hand that back to your Honor.

Now, to move forward on Mr. Geffner's question if we can show any other questionable dispatches, let's go to a dispatch of a man by the name of Alex Blancarte. Now, you will notice that on some date in February of 1967, according to the Carpenters Health and Welfare

Trust records, Mr. Alex Blancarte --

THE COURT: Alex Blancarte?

MR. HOBART: Yes, your Honor. It is spelled B-l-a-n-c-a-r-t-e.

Q -- was dispatched to Pozzo Construction Company, and we don't know the date that dispatch occurred, whether it occurred before or after he was dispatched to Shirley & Associates; but the Pozzo Construction Company job lasted until December of 1967.

A Could I ask you one question?

Q You surely can.

A Where was the jobsite?

Q Gee, if you'd only kept the records we could have answered you, but I just can't tell you, Mr. Daley.

A Well, Mr. Hobart, Pozzo is a pretty big construction company, and so is Swinerton & Walberg. If I can't know the

[RT 1300]

address of the job, how do I know he was dispatched in my area?

Q Well, you can be sure of one thing, he was on your sheets, because I will show you

the name on the sheets.

A You're allowed to go to any local and have your name on two or three local sheets.

Q Well, as I indicate, your counsel has all the vast powers available to him. You can go out and check all the other sheets of the other locals, and if we are trying to infer something else --

MR. GEFFNER: Your Honor, you can be sure we are not going to check 34 other locals out-of-work sheets.

THE COURT: This is from the health and welfare records. What month did you say Blancarte was sent to Pozzo?

MR. HOBART: February, your Honor.

Your Honor will notice I'm only sticking to the three months where counsel asked Mr. Hill if he could name one single illegal dispatch, so we are just going to stick -- during those first three months, so we are just going to stick to that first three month period.

THE COURT: Well, have you got Blancarte's relative position?

MR. HOBART: Yes, your Honor, I'm going to get that right now.

On the sheets of -- well, if I have my own here I can do it quicker.

Mr. Hill suggested to me that maybe a Catholic church over on Hill and Main, that

[RT 1301]\*

Pozzo job. Does that ring\* any bells with you?

A I seem to remember several buildings with Pozzo. One was in Hollywood, one was in West Hollywood.

Q I'm just trying to be helpful.

A Well, I don't think that's being helpful, because that's a leading question, because you suppose it's a church. I don't know.

Q I don't suppose it, I didn't know Pozzo built that church.

A Well, they did.

Q That's good to know.

Now let's take a look at the sheets of February 13th. We see that Mr. Hill was on page 5 on those sheets, I believe. He is indeed, he's the last name.

Now, let's see if we can find Mr. Blancarte on here anywhere.



A I didn't see this other individual. You don't want to check on me, or anything? Like the judge said, haste makes waste.

Q You go ahead. I may be as wrong as rain, I'm just trying to save time.

My mistake, my notes are that Mr. Blancarte does not even appear on these sheets, so naturally, we are not going to find him.

A I don't think Mr. Blancarte belongs to Local 25.

Q You don't?

A I'm pretty sure he doesn't.

Q Well, I'm not sure how we are

[RT 1302]\*

going to correct\* that at the moment. I am under the impression he does, but let's just take a look at when he does appear on some of the sheets. We'll see what local he signs.

Does anybody know offhand? Do you know if he was a member of this?

MR. SCOTT: I don't know if he was there. We have several Blancartes.

Q BY MR. HOBART: It wouldn't matter, anyway, even if he wasn't there.

A Well, of course it would. Suppose he was being sent to -- if he was dispatched to Pozzo Construction by his own local, the health and welfare records would show it.

Q Well, I'm suggesting that he was sent from here, because he shows up on your sheets over the years time and time again.

A No, he doesn't, sir.

Q I don't have time to debate you now, but I can tell you I have seen the name.

A You have, certainly. I have seen them, too.

Q On Local 25 sheets?

On Local 25 sheets, but ordinarily he signs somewhere else.

Q All right.

Now, if the records show Mr. Blancarte received an appointment in 2 67 to Pozzo, and I won't add up the hours, but altogether the months that that lasted, it was a 12-month job --

THE COURT: Twelve months?

[RT 1303]

MR. HOBART: Twelve months, your Honor.

Hill on sheets, Blancarte not.

Q If you just, for purposes of making a point, if Mr. Hill is on those receipts above him, and Mr. Blancarte is not on those sheets, under the rules, and if there was no request, Mr. Hill should have been offered that job before Mr. Blancarte, if there was no request, shouldn't he have?

A I don't admit that -- I can't see where the man was on the books at all, where he was dispatched. You haven't shown me where he was dispatched.

Q Well, I've shown you numerous occasions where men aren't on these books, and they were dispatched, Mr. Daley.

A You had the dispatch, too.

Q So you know it's something that happens, and it happens frequently.

A Not in this instance.

Q Mr. Daley, because we don't have the records, is not our fault.

A Well, then, I don't think it is --

Q The point I'm making is, you have seen it time and time again where men have been dispatched to jobs that aren't even on the sheets.

A You are trying to put words in my mouth that I cannot possibly accept. This man was not even on the list.

Q Which man?

A Blancarte, according to you, and I say he didn't even belong to the local, and therefore, it is very -- more than probable that

[RT 1304]\*

the man was dispatched from his own\* local.

Q Would you have suggestion as to how we could check, at this date, as to whether Mr. Blancarte was a member of Local 25?

A One definite good suggestion.

Q What is that?

A Subpoena the records of 34 locals.

Q Why not just have Mr. Scott call his own local? He could do that, couldn't he?

A You mean you want him for a witness, too?

THE COURT: He's already been a witness.

THE WITNESS: Well --

MR. GEFFNER: Mr. Hobart, if you tell us what you want, we will try to check it out for you.

MR. HOBART: Yes. If somebody would just telephone Local 25 and ask how long Mr. Alex Blancarte has been a member of that local.

MR. GEFFNER: We will find out.

MR. HOBART: Thank you very much.

Your Honor, I would offer the health and welfare record of Mr. Blancarte as plaintiff's next in order.

THE COURT: All right, that will be 63.

Q BY MR. HOBART: Would it refresh your memory at all, Mr. Daley, if I said Mr. Hill said Mr. Blancarte has been a member of that local for at least ten years?

A I'm sure you are able to judge for yourself whether he is or not. I can't testify to that.

Q It doesn't refresh your memory one way or the other?

[RT 1305]

A I say he wasn't.

Q All right.

If you would direct your attention to the sheets of January 9, 1967, you will note Richard T. Hill's on page 10 at line 6.

Tell me when you have found that.

A 6, that's right.

Q Am I correct so far?

A Right.

Q Now, if you will review any part or all of those sheets that you want, and tell me whether you see the name D. Vandenberg on those same sheets.

A You want 1-9-67?

Q Yes.

A On any page?

Q On any page -- well, wait. Let's do this even more accurately.

Yes, okay, 1-9-67. Do you see him anywhere on the pages?

A What is the name again?

Q Vandenberg. You know that name, don't you, Dennis Vandenberg?

A No, sir.

Q Okay. Do you see him anywhere?



A I haven't finished yet, Mr. Hobart.

No, sir, I don't see him.

Q Okay. We don't see him on the January 9th sheets.

The health and welfare records indicate  
[RT 1306]\*

that he\* was dispatched in January to a Carlsen & Herold Company, and he stayed there two months, through January and through part of February of '67, earning a total of 80 hours.

A Again, what job address?

Q Again, I'm sorry, I have unavailable sufficient records to give you that information, Mr. Daley.

THE COURT: What was the company that he was sent to?

MR. HOBART: Yes, your Honor.  
Carlsen, C-a-r-l-s-e-n --

MR. GEFFNER: Your Honor, I want to object to Mr. Hobart's words "dispatched," based on the health and welfare records. The health and welfare records indicate the name of the employer and the hours worked. It does not indicate "dispatch" or regular employee, or from one -- all it states is the name of the

company and the hours.

THE COURT: I think that's right.

MR. HOBART: I will be glad to call it whatever he wants to.

Q Now, sticking with Mr. Vandenberg again, on the sheets of 2-6-67 you will find that Hill is at page 6. See if you can't find him on page 6.

See him there?

A Yes, sir, 16.

Q Line 16. Now take a look at page 14, tell me if you don't see Mr. Vandenberg's name over there.

A Yes, I see one written in, or printed in, I mean, by hand.

Q D. A. Vandenberg; right?

A Yes.

[RT 1307]

Q And he's on page 14, line 20.

A Page 14, line 20, yes.

Q All right.

Now, the records of the health and welfare indicate that he was -- what's the word you wish us to use?

MR. GEFFNER: Well, if you're going to be accurate, the health and welfare records only show the hours and the name of the employer.

MR. HOBART: All right.

Q The health and welfare records indicate that he worked for Conant & Lieberman -- I'll just write Conant, if you don't mind, just for the sake of -- I'll put Conant and L -- and that that job garnered for him 16 hours.

You said Hill was on page 6. Is that what we said on that?

THE COURT: Page 6, line 16, yes.

MR. HOBART: And Vandenberg was on page 14, line 20, was it, your Honor?

THE WITNESS: That's right.

THE COURT: Yes.

MR. HOBART: All right.

Q Then to Mr. Vandenberg's additional good fortune on -- let's see, Mr. Vandenberg does not appear, according to my notes, on the 2-13 sheets, so let's go to the sheets after the 2-13 sheets, which would be the 2-20 sheets.

Okay. Well, I didn't notice where he was, but if he's not on the 2-13 sheets, and Mr. Hill, on the 2-13 sheets is getting up there now. There he is, on page 5.

[RT 1308]

Okay, first let's just satisfy ourselves that Mr. Vandenberg hasn't gotten ahead of Mr. Hill.

I don't see him in front of him here, nor here, there. It would be pretty impossible for him to be ahead of him, anyway, since he's been working.

Let's just see if we can find Vandenberg now. No, I don't see him on the 2-13 sheets, and maybe we can just give it one last shot for the 2-20 sheets.

Oh, here they are. Let's just see if we can find him on here, starting at the back of the book, since that's probably where he would be.

Well, Dick Hill is still on page 5, isn't he?

A Page 5, second line.

Q All right. And Mr. Vandenberg doesn't show up on the 2-20 sheets?

A No, sir.

Q Now, the record will show, health and welfare records will show -- can we do just one more?

Let's take the 2-27 sheets. Let's just exhaust all possibilities, shall we, for the kick of it? As long as your eyes and my eyes can take it one more time, let's just do it.

You see Mr. Hill's got to page 3 now, anyway.

A Is that page 3?

Q Oh, I'm sorry, I was reading that. He hadn't quite got to page 3.

A You are upside down, weren't you?

Q That's right. Mr. Hill has been

[RT 1309]\*

plodding along,\* and he has only got to page 4. He was a long time on page 5, wasn't he?

A Yes, he spent a little time there.

Q Where is Mr. Vandenberg?

Well, all the rest of the way Mr. Vandenberg had the pleasure of sitting on the sheets.

THE COURT: What date was that?

MR. HOBART: February 27th.

Q But the record will show, will it not, Mr. Daley, that on February 27th -- strike that -- that in February 1967 D. Vandenberg worked for the Dinwiddie-Simpson Company, starting in February, and he worked for a total of one, two, three, four, five, six, seven -- total of seven months, earning, we'll say, an average of better than 150 hours a month.

Unlike Mr. Hill, he didn't have to sit there on page 5 for so long.

Your Honor, I would offer into evidence the health and welfare record of Mr. Vandenberg.

Your Honor, I think there would be a stipulation by counsel. They have just kindly obtained the information that Mr. Blancarte transferred to Local 25 in January of 1965.

MR. GEFFNER: January 12th.

Q BY MR. HOBART: That's news to you, isn't it, Mr. Daley?

A Definitely is, because he was always a member of another local, that I knew of.

[RT 1310]

Q All right, let's go on to another fellow by the name of Joseph Kulcheski. You remember Joseph Kulcheski, don't you?



A Sounds familiar.

THE COURT: Just a moment. The Vandenberg health and welfare records will be 64.

MR. HOBART: Thank you, your Honor.

Mr. Kulcheski -- take a look at the 2-20 sheets. Hill is on page 5. Now we are going to have to find out where Kulcheski is. He's in here somewhere, but I'm just not sure --

THE COURT: What date is this on the sheets?

MR. HOBART: These are the 2-20-67 sheets. Hill is at page 5, line 2, and I think Mr. Kulcheski may appear ahead of him. Let me just check.

Q Now, the records will reveal, will they not, that Mr. Kulcheski is on page 2; is that right?

A Yes, sir.

Q He's down around line 11, or so?

A Somewhere around there.

Q All right. Now let's just see whether he's legitimately there. He should be the same place on the 2-13 sheets, shouldn't he, in the relative position?

See if Mr. Kulcheski is on page 2. Take a look at the names around there.

The name immediately above him is Howard Wolfe, and the name immediately below him is Reid Smith. Do you see Mr. Wolfe and Mr. Smith anywhere?

Lay them flat out so we can both take a

[RT 1311]\*

look at it\* easier.

I see a Reid Smith over here. Now, Reid Smith is the name that on 2-20 is immediately below Kulcheski, and looking at Mr. Smith on 2-13, I do not see the name of Kulcheski either above him or below him, do you?

A No, but he could have been re-dispatched, of course.

Q Could be what you call a pickup; later put back because he was --

A Well, yes, it could be -- whatever it needed, or whatever was necessary for him to be. He could have been --

Q Well, let's be entirely fair to both sides. Let's take a look and see whether on the 13th Mr. Kulcheski shows up at all.

If you want to take my word for it, you can, but if you want to kind of keep an eye on it, you'd better do it.

A Go ahead.

Can I save a little bit of problem here? You'll find Kulcheski on page 3 on 2-6.

Q Okay, let's see where he is in the meantime.

A And Reid Smith is directly below him again.

Q Now, the health and welfare record indicates that in January 1967 -- let's go back to where he was now.

A Here he is, right here, 2-6.

Q The health and welfare record indicates that he worked 36 hours in January; is that right?

THE COURT: How many?

MR. HOBART: 36 hours.

THE WITNESS: I wouldn't have any

[RT 1312]\*

knowledge of that, and\* I don't know the contractor.

Q BY MR. HOBART: Well, these records have been compiled by the Carpenters Health and Welfare Trust for Southern California Eligibility Department --

A But not with addresses or dispatches.

Q No, but this doesn't matter, you see, Mr. Daley. You have already told us that once a man works 16 hours he's supposed to be dropped from the list.

A If he was dispatched from another local, and he was dropped from the list, maybe -- I don't know where he was dispatched from.

Q Mr. Daley, for the first time now in two days, now you've been talking about being dispatched from another local.

What reason do you have to think this man, or any of these men have been dispatched from some different local all of a sudden? Why has that popped into your thinking?

A Well, the only reason is, you are bringing in these incomplete records from the health and welfare.

Q We have asked the health and welfare people to compile the names of the contractor, the months they worked for them, and the number of hours they worked during that month.

A Well, Mr. Hobart, you are assuming this job was in the area, or under where I dispatch from, and I can't say it was because I don't know the contractor. I don't remember him.

Q Well, as you have indicated,

[RT 1313]\*

sometimes your memory\* isn't what you'd like it to be.

But is it not a fair statement, Mr. Daley, that when a man works over 16 hours in the month of January, and here he worked 36 hours, Mr. Kulcheski did, the man should go to the bottom of the list?

A What list?

Q The out-of-work list.

A Whereabouts, Local 25, or where he was dispatched from?

Q You mean to say that it's permissible for a man to be working, and still be on some other books at the same time?

A How can you check it?

Q Will you first tell me whether that's permissible.

A No, it isn't.

507.

Q All right. Let's presume, unless you know something different, let's presume the men are following the law.

So, Mr. Daley, the point I'm making is, that once a man works 36 hours, he belongs at the bottom of the list when that's over. That's the rule, isn't it?

A Usually that's the rule.

Q All right. And in our case, on the February 6th records, Mr. Kulcheski, who has just finished working at least 36 hours, finds himself, fortunately, to be located on page 3, which is some distance from the bottom, and there are 16 pages of out of work people.

A I don't know where he got his 36 hours from, and I wouldn't have no availability

[RT 1314]\*

to the health and welfare;\* so if he registered on my books, I would have no way of knowing that he worked some other job for 36 hours, or three minutes. I would have no way of knowing this. I would have to accept the man's eligibility as he stood there before me.

I have Joe Kulcheski on 1-6-67 on page 3. Reid Smith is above him.

Q There is just nothing that gets in at the bottom of that list, is there?

508.



A It seems like Mr. Reid Smith jumped up five or six men ahead of him here, so we are not infallible on that roll call.

Look here, and he was below Joe Kulcheski two weeks, three weeks, that I know of, according to these records.

Q Mr. Daley, there's one thing I will agree with you, and that is that you are not infallible on that roll call.

A I agree with you there. I had no secretary to keep the books for me.

MR. HOBART: Your Honor, I have the health and welfare record for Mr. Kulcheski, and ask that it be marked plaintiff's next in order.

THE COURT: All right, that will be 65.

Q BY MR. HOBART: How about a man named L. J. Spencer, are you familiar with him?

A Yes, I am.

Q Did he ever work as a steward for you?

A Yes, sir.

Q Directing your attention to the [RT 1315]\*

sheets of 2-13\* and 2-20-67, again, on both of them Hill's on page 5, and I have gone through both of those sheets, and I've gone through the rest of the sheets for February, which I invite you to do if you wish, but I could not find the name of L. J. Spencer on any of those sheets.

A For what?

Q For February 13 or February 20th or February 27th, if you'd like to take a moment and go through one of them at random just to satisfy yourself.

A Well, it just happens that this young -- this man was a steward.

Q Okay. Well, we'll get around to that steward business in a moment.

Do you want to just concede that he's not there, or do you want to take a look?

A Of course, we don't want to take up this time.

Q All right.

He doesn't appear on the books, and the out-of-work records indicate that in February 1967 he received a dispatch to Western-Alta

Construction Company, where he worked for 112 hours, and then he received another dispatch in February 1967, again without ever going back and having to sign the books, to the Samuelson Bros. Construction Company, where he worked in February apparently the balance of the month, 20 hours, and then worked in the same company in March, April, May, June, July, August, September, October, November, December, totalling hundreds and hundreds of hours, probably averaging a hundred and fifty, a hundred

[RT 1316]\*

sixty hours\* a week. Would that be about a fair statement?

A Well, it would prove one thing, that he had no business being on this book here, or on this dispatch list.

Q Why shouldn't he have been on this book.

A You've got his work record there, supposedly.

Q I thought you told me you always started a job from the work list?

A I never started any job from the work list, it was the contractor that started the job, and then took his own men in there to start the job.

Q Oh, well, was L. J. Spencer one of their men?

A I wouldn't have any idea, but evidently, working for Samuelson as long as he did, and as a steward, he must have been well thought of to keep him that long.

You don't keep a man that long and pay him \$250 a week unless he's quite qualified to earn it.

Q That may very well be the case.

With reference to his dispatch to Alta Construction in February of 1967, can you tell me why he did not appear on the sheets prior to getting that dispatch?

A I have no way of knowing, Mr. Hobart, that that man was dispatched from Local 25.

Q That's right, he also may have come from some other local.

A He's a member of Local 25. This I know.

Q How many other locals did you know that he was working out of?

A I wouldn't be able to say.

[RT 1317]

Q You didn't know of any, did you?

A No, I didn't.

Q Well, then, why raise the issue that he may have been working for someone else?

A Because it's allowed. It is permissible to go to other locals and register on their out of work sheets.

Q Do you think a man that's going to be getting these kind of hours out of Local 25 is going to be fiddling around with some other local?

A If he's a union man, he would.

Q He can only work for one, and have his name on one, can't he?

A Yes, sir, he could, if he wished to.

MR. HOBART: Your Honor, I have the health and welfare records for Mr. L. J. Spencer, which I offer as plaintiff's next in order.

THE COURT: All right, 66.

Q BY MR. HOBART: Now, to get these back in order again, Mr. Daley; and believe me, Mr. Daley, I hate taking up your time, our

time, and the court's time for this --

A I'm perfectly happy.

Q -- but the question was asked if we can name one. We certainly must try.

You may recall this period of time, Mr. Daley -- or do you recall January, February, March 1967, how Richard Hill, constantly at the window, constantly charging that you were making illegal dispatches.

A I'll never forget it.

[RT 1318]

Did you ever admit to him that you were making any illegal dispatches?

A The conversation between him and I during the day and the night while we were drinking was continuous, one accusation after another.

Q Did you ever admit to him that you were making illegal dispatches, and "What are you going to do about it, Dick," anything like that?

A I couldn't possibly make such an admission to an antagonistic fellow like him, even if I was doing it illegally, which I wasn't.

Q Okay. If you will start with the sheets of January 23 --



THE COURT: '67?

MR. HOBART: '67, yes, your Honor.

Q Now, if you will look on page 2, line 8, you will see the name of David Fonseca, I think. This page is 1 here, and I think somehow it got reversed.

A Quite a few things are reversed around here.

Q I couldn't agree with you more; but if you will allow me to straighten the matter out, that's page 1, and if the numbers mean anything, that's page 2.

A I guess we are supposed to take it that way. That's what it is numbered there.

Q All right. Just make that mental note on that one the pages are reversed, page 1 and 2.

A Page 1 is page 2.

Q Right. Now, at least that's the way it is marked.

[RT 1319]

A Yes.

Q. And you see David Fonseca is on page 2, line 8; is that right?

A Yes, sir.

Q All right. Now, let us see if David Fonseca is on the week before at anywhere near the same place. That would be the week of the 9th.

David Fonseca on the 23rd is between the names of Ebbe and Collins. Just see if we can find either of those gentlemen.

Okay. We find Fonseca, so he's okay; right?

A Supposedly.

Q He's about where he should be?

MR. GEFFNER: What date is that, again?

MR. HOBART: Beg pardon?

MR. GEFFNER: What date is that?

THE WITNESS: 1-9, which would be 1-9-67, Monday.

Q BY MR. HOBART: We won't go any further beyond that, so we'll just get that one.

Looking again on 1-23, page 5 --

A You jumped a week.

Q 1-23 --

A This is 1-9.

Q Yes, I'm just moving on to 1-23 here.

A You don't want the 16th then?

Q I will want it in a second, but I don't want it right now.

Okay. We see the name of David Bolton,

[RT 1320]\*

page 5, \* down at about line 12 or so; right?

A Yes.

Q Okay, let's just see if he's on 1-16, at roughly the same place. He would be after Milton French.

Okay, I see Milton French on page 5. Let's see if we can find Bolton anywhere.

Well, we certainly don't see Bolton up high like he appears, do we?

A No, sir.

Q Okay, so maybe he's in front. Let's doublecheck it that way. We don't want to make any mistake to your disadvantage.

All right, we do have where Mr. French is, which is exactly where Mr. Bolton should be.

On the list of 1-23-67 we have the names French, Bolton Whyt; on 1-16, the preceding week, we've got French and Whyt, or Whybo, and some guy named Dyroy.

So Mr. Bolton would appear to be a sneak-in on 1-23, wouldn't he, or a pickup?

A I don't know how he would appear that -- have you checked -- see, these are typed records, now, and of course, the signature records are the authentic ones.

Q That's all that have been provided for us.

A Well, my dear sir, you just don't type a man's name in there without having his signature to a list that -- we have a signature list.

Q And wasn't it your policy to start typing these lists up?

[RT 1321]

A Not my policy. We used to have to hire the girl in the financial secretary's office to do these day by day.

Q And you told her to type them up exactly the way they appeared in the handwritten list?

A In the signature list.

Q So we'll assume she followed your orders, and somehow Bolton's name shows miraculously on this sheet?

A Or it disappeared miraculously on the other one.

Q We don't have the notes here, but Mr. Bolton, on April 3 was dispatched. We won't worry about that right now.

But Mr. Bolton's presence on 1-23 constitutes a sneak-in?

A It wouldn't constitute a sneak-in there, because the circumstances are somewhat hazy the way you represent it.

Q I'm only reading what is on the record, I'm not representing anything.

When I say sneak-in, all I'm saying is he wasn't there the week before.

A Without my cooperation, you mean?

Q He wasn't there the week before without your cooperation.

A That's what you are saying?

Q Well, I don't know where he was or whether you and he were fishing.

A I sure don't know where he was, either, I'm pretty sure of that. I don't know.

[RT 1322]

Q We know one thing, if he's not there one week, he's not entitled to be there the next week.

A Probably working.

Q If he's working, that's another reason he is not entitled to be higher up on the list?

A Did it ever occur to you we took him off the list because he was in an illegal position?

Q It would have occurred to me if that was --

A This is one other thing. I didn't have time for all of this book work. I notice here you don't do the complete writing, and you're only here for weeks. You don't do all the writing up there.

THE COURT: Well, I think we are all getting a little tired. We'll take a ten-minute recess, and the jury is given the usual admonition.

(Recess.)



THE COURT: All right.

MR. HOBART: Thank you, your Honor.

Q Mr. Daley, I'm going to just limit this for us to the amount which I have on the board, both to save all of us from falling asleep and from the rigors of monotony.

We left off with -- let's see, which one of these gentlemen -- Mr. Bolton. I guess we have done Mr. Bolton already, and we are now onto Mr. Dawes.

If you will take a look on the sheets of 1-23-67, keeping in mind that page 2 is page 1, and vice-versa.

A What page do you want me to look at?

Q Page 2, line 14. See this fellow, Mr. Dawes, there?

[RT 1323]

A X. J. Dawes.

Q All right. Would you be so kind as to tell me whether Mr. Dawes appears the week before, whether he's moved up to his high level, or whether he, by virtue of sneaking in, got there?

Keep in mind this is page 2, so you don't want to make a mistake. You are looking on page 1, on the next one.

A Oh, yes, I'm confused for sure.

Q I wouldn't want you to do that. I want you to have every opportunity for fairness.

A That would be this here?

Q That would be page 2, and maybe on page 3 would be a better place to look.

Do you see him on page 3, by any chance? Let me give you some other names around him. Maybe we can spot some of the names around him.

How about Deckelmann and Baxter and Coleman below him. Do you see Deckelmann, Baxter, or Coleman on page 2 or 3? Do you see a Baxter?

A I don't see Deckelmann, I don't see Coleman. I don't see any of those. No, I don't see any of those behind him.

Q All right. How about some of the people in front of him; Valles, Waldner, anything like that?

There's Coleman. Here's Coleman over here.

A Page 3?

Q Yes.

[RT 1324]

A Yes, I see -- but I don't see Dawes.

Q You don't see Dawes anywhere,  
do you?

A No, sir.

Q Which makes it look like a sneak  
in? In other words, he wasn't there the previous  
week, now he's high up on this week?

A This is the way it could be. Could  
we go back to probably 1-9?

Q Yes, by all means.

A I mean, there is a potential there.

Q There is that potential, and I could  
always be wrong.

A I find no Dawes up to page 4.

Q All right.

Now, we don't have the date he was dis-  
patched, so we'll move on to the next one.

After Dawes, let's go to Mr. Maurovich,  
and --

A Which one?

Q No, take a look at the sheets of --  
yes, 1-23-67.

A Page?

Q Page 4, line 10.

A Rudolph Maurovich.

Q Okay. He's just below a man by  
the name of Williams, and just above a name by  
the name of Plai.

Let's take a look at the preceding week  
and see if we can find him.

A 16?

Q Yes.

[RT 1325]

A Page 10, was that?

Q No, that was page 4. Keep that  
out.

It probably would have been on page 4 or  
page 5 on this one.

A What names are we looking for,  
Williams and Maurovich and Plai?

Q Yes. I see Burrell, Kulcheski, Maurovich, any of those names -- here's a Burrell, Robert.

A There's Brown Burell, and then Robert Burrell.

Q We're looking at Brown Burrell.

A There's a Williams, here's a Brown Burell.

Q All right. Now let us see if we see our friend Mr. Robert Maurovich.

A No, I don't.

Q Okay. Again, though, like you say, to be fair, let's go back one more week to the 9th, just in case he was a pickup.

He would be about page 4 or 5, wouldn't he?

A According to some of these things he could be anywhere.

Maurovich.

Q All right. Mr. Maurovich got a job, did he?

A That seems to be so.

Q Seems to be dispatched to where?

A Weitzul Construction Company at 21st and Norwood.

Q All right. Now, that dispatch was in the week of --

A The 9th.

Q -- the 9th. Now, the only way he [RT 1326]\*

would legitimately\* be back up on this week would be is if he had 15 hours or less; isn't that right?

A I would imagine that's it.

Q So since we don't have that information, we'll have to make a note and see if we can get it.

Now give me the week he was dispatched.

A That was the week of 1-9.

Q And to what company?

A Seems to be Weitzul Construction Company.

Q Spell that.

A Spelling it the way I think I see it is W-e-i-t-z-u-l.



Q Construction?

A Construction Company.

THE COURT: 21st and Norwood?

THE WITNESS: Yes, sir.

THE COURT: Where I went to kindergarten.

THE WITNESS: You're pretty familiar down in there.

THE COURT: Yes.

Q BY MR. HOBART: All right, you will notice that he also was dispatched February 13th, 1967. You've got --

A No, I haven't looked at that.

Q Let's find the sheets for early February.

A But are we going to skip over where he was on the thing here? Where was it? You had the 23rd. Are we going to skip over there? Perhaps he was back in position because of 15 hours.

Q Well, that's what I said. I made  
[RT 1327]\*  
the notation over\* here.

The only way we're ever going to do that is by checking it out by the health and welfare, to see how many hours he worked. I have no way of doing it now.

A Right.

Q All right.

Then the next one was J. Plai on the sheets of 1-23, taking a look at page 4.

A He's down about the middle of the page, about ten or eleven. Let's see -- eleven.

Q All right, now take a look at the following -- or the preceding week's notations, and let's see if he was there for the week of the 16th.

A What page did we say that was, 5, 4?

Q Page 4, line 11.

A Page 4. I don't find him.

Q Okay. Let's try the week before, then -- oh, that is the week before.

A No, I tried this one first. Now we are supposed to try the 16th.

Q He's not in there on the 9th, so do you want to give it a shot for the 16th?

A That would be back about --

Q He was on page 4.

Okay, he doesn't show up; isn't that right?

A Let me complete this, Mr. Hobart.

Q I'm sorry.

A It appears he's not on this list.

[RT 1328]

Q All right.

Moving right along, let's try Mr. Toney  
for the week of 1-23, page 3, line 15.

See his name there?

A Yes, sir.

Q Okay, page 3, line 15 for the week  
of 1-23.

Now let's see if he's on the week of 1-16,  
and I'll look at the week of 1-9.

A I can't find him.

Q You can't find him there, but I  
found him on the week of the 9th on page 5, line  
6.

We will go one back further, and we'll  
see why he's not there that week.

We will have to check his name out and  
see what happened to him.

A We have two more. I don't see  
Levy or Frederick, and neither one of them are  
here. I was trying to use them as markers.

Q So we can't call either one of  
these, until we have answered these questions,  
sneak-ins, until we really know they weren't  
moved forward for some reason legitimately.

Now, going to the sheets of January 30th,  
Mr. Hogan -- do you have January 30th there?

Mr. Hogan, line 4 -- I mean page 4,  
line 20.

A Who?

Q Hogan.

A Oh, yes.

[RT 1329]

Q See him there?

A Yes.

Q Okay. See if you can find him  
back the week before.

A I don't seem to find him.

Q Now, will you agree with me that on the week of February 13th, 1967, when Mr. W. Hogan was dispatched to Swinerton & Walberg --

A Where did you get these? I'm not familiar with this here.

Q These are the out-of-work sheets, aren't they?

A I don't know. They are peculiar shape and size, and all that.

Q They are photocopies. They are reductions.

A Oh, I see. I see. No wonder you had me confused.

Yes, What's the date on it?

Q The date is the 23rd -- I mean 13th.

A So we went from the 23rd of January to the 13th of February?

Q Right. I'm just pointing out that Mr. Hogan, who didn't show up prior to January 30th, ended up getting dispatched on 2-13-67 to Swinerton & Walberg.

A Why did you use that? This is here, see?

Q Okay, same difference.

That's correct, at any rate, isn't it?

A Yes.

Q Okay. Now, our next one is Mr. King.

Mr. King, on 1-30, page 5, line 7.

[RT 1330]

A On 1-30?

Q Yes.

A 1-30, and what page?

Q Page 5, line 7.

A You are talking of Marion King?

Q I suspect so, M. King.

All right, now let's take a look and see if Mr. King appears on the sheets preceding that. Take a look for the names below him, Compton, Carter, Olvera, Sapp, Williams.

A What did you say there?

Q What page is that?

A I've got page 8. I go back away.



Q That's probably too far back.  
Move forward a little bit.

A Ganier --

Q Okay, there's Ganier and here's  
Sapp.

A Valencia. These are all on page  
5.

Q All right. Now, Ganier is  
immediately below King; right? Over here.

A Yes.

Q And Jacquinet is immediately above  
him?

A Yes, but this -- yes.

Q Mr. King does not appear on that  
prior sheet, does he?

A I don't see him anywhere.

Q All right.

A That's the 23rd. We'd have to  
go to the 13th.

Q Let's go to the 13th and doublecheck.

[RT 1331]

A That would be on page 5. This  
one here is 5, too.

Q Somewhere around 5; 5, 6, some-  
where around there.

A I don't see any of those names.  
None of them.

Q Well, for right now, we'll stick  
to our friend King.

A I don't see Jacquinet, I don't see  
Angel, I don't see Ganier. I don't see John  
Compton.

Q Well, maybe they got dispatched  
and just don't show up.

A See, it's very obvious that some-  
thing happened to them, so they might have went  
back to an old job.

Q Anything could have happened, I  
agree. They could have all ended up in the  
hospital for a week; but beyond that, King doesn't  
show up on this one, does he?

A No.

Q All right.

Now take a look at your sheets for the 20th.

A Right here is where it was.

Q February 20th.

A February 20th, we have to go back over here.

Q Now let's see if you can find Mr. King.

A On what page, 6, 7, 8?

Q Well, I'm not sure. We will just have to look.

A Marion King.

Q Do you see him?

A Yes.

Q On what page?

A But I'm not sure it's Marion King

[RT 1332]\*

we are looking\* for.

Q That's who we have been looking for.

A Well, I'm not sure you've got the right one.

Q You've got Marion King, Sr. there?

A Yes. There's nothing there -- it's a whole family of Kings, I'll tell you that.

Q All right.

Well, let me show you on 3-20-67 --

A 3-20?

Q I mean 2-20-67, and I will show you Marion King is not indicated as a senior, junior or anything else.

A No, he's not indicated as a senior or anything, and it seems to be a copy of this sheet here.

Q Well, not exactly.

A Well, I mean, it seems to be.

Q Well, partially the same, except in these copies that have some dispatches on them, it indicates Mr. King was dispatched to the Eckler Company on Thursday of the week of 2-20-67.

A Yes, but this is page 3 of 2-20, and we're looking at page 9 of 2-20.

Q Well, let's look at page 3, then, by George, and there it is.

A Okay. Now, see, there's a little confusion.

Q Now we are happy, then?

A Right.

Q He did get dispatched, then, to the Eckler Company? How do you spell that Eckler Company?

[RT 1333]

A Well, it looks like Eckler, E-c-k-l-e-r. It's 2060 East 49th Street. I might be wrong. I probably was poaching on somebody else's territory there.

Q They will forgive you now.

A Yes.

Q Okay. Moving on, now, to Mr. Sunkin, 1-30 --

A 1-30?

Q -- page 4, line 19.

A Line 19 -- Oh, page 4.

Q Page 4, line 19.

A Sunkin.

Q Okay. Let's take a look at the preceding two weeks and see if you see him showing up there.

A I don't.

Q Okay, let's go to 1-30, Mr. Washington, W. Washington, page 2, line 11.

A Yes.

Q All right. Take a look and see if he was on the preceding week.

A I'd be amazed if he'd be on the list at all.

Q Well, you are certainly not amazed that he is on --

A I'm amazed, because the man doesn't work.

Q Well, there's two of us amazed, then.

A That's on page what did you say?

Q 2.

A Page 2. I don't find him.

Q Okay. Then how about on the sheets of 2-6-67, Mr. J. Campbell, page 3.



[RT 1334]

A I have to realign these things a little bit every once in a while.

Here we are. What page?

Q Campbell is on page 3, line 5.

A I see him, Jim Campbell.

Q All right.

A Here's that Herbert Sunkin again.

Q Okay. Well, we'll go back through him again, if you want to, but I don't recall where he was. He wasn't on the next week's list.

A What do you want with Campbell?

Q All right, see if Campbell is on the preceding week, February 6th.

A You mean January 30th? What page?

Q Page 3, line 5 on that one.

A Connie Campbell, does that resemble it, or what?

Q Well, if you tell me Connie Campbell and J. Campbell are the same --

A I sure can't do that.

Sunkin. No, I can't find him.

Q Okay. If you look on the sheets for 2-20-67, see if you don't see Mr. Campbell on here.

A Page what?

Q I'm not sure.

A Shall we start from the back?

Q No, from the front. He should have a dispatch after his name.

A Do you want to turn the pages?

[RT 1335]

Q All righty.

Jim Campbell is listed as a pickup, for some reason, and you've got him assigned out, sent out to -- what Lane is that, that job?

A It's not my handwriting, but I'll try to just -- this seems to be 2551 --

Q Beverly --

A -- West Beverly. I'm sure something's wrong there, because the fellow out there would come in and chop my head off if I

sent a man out that way in his area.

I can't get the address here.

Q Well, I see another dispatch here to the same place. It looks like Lanie.

A Well, it could be William Lane.

Q Well, that might be it.

A Or R. N. Lane, I don't know. I can't read the initials, but this is definitely a Lane, and this is, too; but the W -- this would be more accurate here, because there's no West Beverly, or anything like that.

Q I see. Just plain Beverly?

A So the W would be a mistake.

Q Okay. But, in any event, Mr. Campbell did get dispatched that week out to, we'll say, Lane Company?

A Right.

Q All right. We're down to the last three, now.

Mr. Duplantier, on 2-6 -- where are we -- page 3, line 12.

A Page what?

[RT 1336]

Q 3, line 12. See him here?

A What are we looking at, Duplantier?

Q Yes.

A All right.

Q See if he's on the 1-30 sheets.

A Disappeared again.

Q So he shows up here for the first time.

Now, let's take a look at him on the sheets for 2-13, that would be just the next week, and see if we don't find him over here.

A Can I get organized here?

We've got the man on this page here, right.

Q That's the 2-6.

A And he wasn't here.

Q He did not precede it.

Now let's see if we can find him here -- is that this him here, now?

A Dispatched.

Q He was dispatched to the Dinwiddie-Simpson job off the sheets of 2-13; right?

A True.

Q All right. Then we've got somebody by the name of J. St. Amant, something like that. Look on the sheets for 2-6.

A I'm just checking that Duplantier for a moment, may I?

Q Surely.

A We would have to assume that he

[RT. 1337]\*

went to work on\* request, or something like that.

Okay, now what page do you want?

Q Now I want you to check the week of 2-6 again, page 1, line 21. Was the name Joseph St. Amant?

A Yes.

Q Page 1, line 21; is that right?

A That's right.

Q Let's see if he was on the preceding week. That would be on the 1-30 list.

A You'd have to assume he went to work.

Q Okay. Either that, or he's a sneak-in. We could assume that, too, couldn't we?

A I'm always trustful.

Q I don't blame you.

Now, with respect to Mr. St. Amant, I turn your attention to the week of March 13th, and tell me -- I'll show you my copy here.

Joseph St. Amant, top of the page, dispatched to C & I Construction on March 13, 1967.

A What page is that?

Q This is page 1.

A Page 1. This is a copy of this?

Q I don't know if it's a copy of that one, but it's a copy of one that was handed to me, at any rate.

A Here it is right here.

Q That's right. But on this one you can see -- on the one you've got no dispatch is shown, but on the one I'm holding it shows the



[RT 1338]\*

name's been lined out, and dispatched\* to Soto Street.

A This is very easy. That can happen mighty --

Q How's that? You mean sometimes you work off of more than one sheet?

A No, I told you before. I thought you understood. I told you that this roll call was a signature type of roll call. Each man signed the list, and the list can be stolen, disfigured, and marred, and everything, and marked by people out there, which was always -- we had to take this list page by page and type it up, and keep this list within the house.

Now, this here list, and this list could have been typed, oh, maybe Wednesday or Thursday, and we wouldn't show a dispatch here. She wouldn't show it here because he'd been already dispatched, and she was typing out -- in other words, the girl in the financial secretary's office didn't always type them up exactly the same day it should have been done.

If we dispatched on a Tuesday, which we always did, this was something again. She might have typed the page up on Friday, or later, to catch up with our work.

Q Well, all right.

Just to get ourselves back on the point, however, you'd agree that Mr. St. Amant was sent out to work on the C & I Construction job?

A In other words, what I'm saying, this was a first copy, and this one here could have been a later copy.

Q Okay.

A Because this is a photostat, isn't it?

[RT 1339]

Q Yes. Yes, it is.

So the C & I Construction is where he went on the 13th, and the last one, to our everlasting relief, is Mr. Sunkin again.

A Well, here's the same one again. What are we looking for now?

Q Well, Mr. Sunkin, on 2-6.

A Right here.

Q He seems to pop back and forth.

A We saw him several places, didn't we?

Q Yes, we did. Well, why don't we skip him, because he's popped in and out,

and it will be too much trouble to check out, and I'm getting tired of it, and I'm sure you are, and I'm sure the jury is.

A Thank you.

Q Now, Mr. Daley, to make -- Mr. Daley, unless every one of these men on these two pages had been requested by the employer, bonafide employer requests, Mr. Hill's, to use your words, constant complaints of illegal dispatches would be accurate, if those were not employer requests; isn't that true.

A I can't say whether that would come in, because we have no substantiating thing here, under any of this stuff. Nothing is substantiated, whatever.

Q Didn't it occur to you that some man was charging you with official malfeasance of office?

A Official?

Q Official, yes. Did you know he

[RT 1340]\*

was the\* vice-president of your union?

A Yes, I seem to remember that.

Q Fine. And that is an official position, isn't it?

A Yes, it is.

Q All right. Now I'll go back to my question.

When a man is charging you, officially charging you, and going to the District Council, going to your leadership and charging you with malfeasance in office, that is, failing to dispatch according to the dispatch rules, charging you with illegal dispatches of various types and various natures, when faced with those sorts of charges, don't you think that you would have saved all evidence of these requests, had there been bonafide requests?

A Are you trying to say that I was -- if I was guilty, that I would begin to reform myself?

I've never heard of an official accusation of myself whatsoever. I don't know what you mean by official. I've never been charged, as far as I know, myself, personally.

Q You know Mr. Hill charged you?

A No, I don't know any such thing, sir.

Q You didn't know?

A If I had been charged I would have been officially notified by the District Council.

Q Did you know that Mr. Hill was charging you -- that he, personally, was charging you with violating your duties in the dispatch procedure?

A Mr. Hobart, Mr. Hill was charging everybody under anything, and under all circum-

[RT 1341]\*

stances of everything; not\* officially, but on the sidewalk, in the hall, everywhere, in the bars. He'd be calling me a drunken bum while I am buying him a drink.

Q Mr. Daley, I don't know if it's impossible for you to give me a yes or no answer to this, but I can wait as long as you can.

Did you know that Mr. Hill was charging you with violating the rules of dispatch by sending out people and calling them requests when they weren't; by sending out people under the table; giving them dispatches when their names weren't on the list, and when they were not requested; things of that nature?

A You're asking me did I know this?

Q Did you know he was accusing you of that?

A He was accusing me of that to my face, but not officially, or down there with the charges.

Q I see, okay. But he was accusing you in that manner to your face?

A Socially, to my face, at the window, yes, always.

Q All right. To your face he was making those charges?

A Yes.

Q My question is this. If all of these people that we've gone through, and the hundreds more we could go through if time and patience allowed it, are you telling me that all of these people were probably requests, but you just never saved the request forms?

A I can answer you this way, that if all of these requests, or all of these people

[RT 1342]\*

were as illegal, whatever\* you want to say, as you intend to imply, I wouldn't have lived through the day with all my membership.

\* \* \* \* \*

[RT 1936]

MR. HOBART: I'd like to read, your Honor, interrogatory No. 8, of the interrogatories propounded on May 16th, 1972, and the answer thereto.



THE COURT: Who is answering?

MR. HOBART: I'm sorry. This was propounded to the Los Angeles District Council of Carpenters, and their attorneys of record.

THE COURT: Very well.

MR. HOBART: Interrogatory No. 8 reads:

"Please describe in sufficient detail all Local 25 official documents or other records which in any way involve RICHARD T. HILL the dispatching procedures for the period from January 1, 1967, to January 1, 1969, which you contend are presently on file with the National Labor Relations Board."

The answer to interrogatory No. 8 is as follows:

"Dispatching records of Carpenters Local 25 for the period of January 1,

[RT 1937]\*

1967 to\* January 1, 1969 would contain work request registration forms sometimes referred to as out of work lists dispatching orders sometimes referred to as work orders. Such records were given to the National Labor Relations Board and to this day representatives of

Local 25 have not been able to locate such records at the offices of Local 25 or any other office of the United Brotherhood of Carpenters and Joiners of America."

Then three questions, three interrogatories posed on October 19th, 1972, to the defendants and their attorneys. Interrogatory No. 1:

"Please set forth, fully and completely, all EMPLOYMENT LISTS (also referred to as Out Of Work lists) presently in the possession of any Defendant herein, which were signed or prepared during the period of January 1, 1967, through January 1, 1969. (Please set forth the weekly date of each such list.)"

Inasmuch as the answers are all the same, I will read all three questions. Question No. 2:

"Please set forth, fully and completely, all EMPLOYER REQUESTS, whether formal or informal, presently in the possession of any Defendant herein, which were prepared during the period of January

[RT 1938]\*

1, 1967\* through January 1, 1969."

And question No. 3:

"Please set forth, fully and completely, all WORK REFERRAL SLIPS, which are

in your present custody, which were used to dispatch Local 25 carpenters to job-sites during the period of January 1, 1967, through January 1, 1969."

The answer to each was that inasmuch as plaintiff has already inspected and photocopied all of the aforementioned records at the defendants' offices, and is or should be fully aware and knowledgeable of the contents thereof -- and the same answer for all three. Those answers to those interrogatories were dated November 14th, 1972.

And interrogatories propounded by the defendants to Mr. Hill on July 6th, 1972.  
Question No. 9:

"Have you seen any doctors other than those mentioned in Questions 1, 3, and 8 above within the last ten years.

"A. If so, please state the name of each doctor.

"B. If so, please state the dates on which you saw each of said doctors.

"C. If so, please state the nature malady for which you were treated by each of said doctors."

The answer to No. 9 was:

"Yes.

[RT 1939]

"(a) Dr. Collin E. Cooper; May 1967. Dr. James Sheehy; June 1967. Dr. Stuart and Dr. Morris, 108 South Brand, Glendale; December 1967. Dr. John Warburton; July 1970. Dr. Berle Barth; October 1970. Dr. A. J. Nuefeldt; June through December 1971. It is difficult to remember doctors. If I can recall more I will tell my attorney."

Plaintiff rests, your Honor.

THE COURT: All right.

MR. HOBART: Oh, your Honor, with one exception. We have made a couple of lists over here which I would like to have marked and introduced.

I'd like to have the two sheets which have been indicated as early 1967 questionable dispatches, would ask this sheet be marked as plaintiff's next in order, these two sheets be marked as plaintiff's next in order and received into evidence.

THE COURT: We will mark them as 76.

MR. HOBART: I will give these to Mrs. Chappelle.

THE COURT: Yes.

MR. HOBART: I'm not sure there is anything else over here, but let me just examine the board.

I won't introduce these out-of-work computations, your Honor. With what records we have, I think we have it all in the record orally.

\* \* \* \* \*

[RT 2067]

KURT GILLIE,

called as a witness by the defendants, being first duly sworn was examined and testified as follows:

THE CLERK: Be seated, please, and state your full name, sir.

THE WITNESS: Kurt Gillie, G-i-l-l-i-e.

THE CLERK: C-u-r-t?

THE WITNESS: K-u-r-t.

DIRECT EXAMINATION

BY MR. GEFFNER:

Q Mr. Gillis, what is your occupation?

A I am a carpenter foreman.

555.

Q And how long have you been engaged as a carpenter, either as a foreman or otherwise?

A Since 1939.

Q And are you a member of the United Brotherhood of Carpenters and Joiners?

A Yes.

Q How long have you been a member?

A Since 1951.

Q And what local are you a member of?

A Carpenters Local 25.

Q Have you been a member of Local 25 since 1951?

A No, I came to California in 1959.

Q Is that when you joined Local 25?

A Yes.

Q Prior to that time what local did you belong to?

[RT 2068]

A It was a carpenters local in Canada.

556.



Q You were a member of the Canadian local?

A Yes, sir, but it was the United Brotherhood of Carpenters and Joiners of America.

Q Same brotherhood?

A Yes.

Q Then you moved to California and transferred membership to Local 25?

A That's correct.

Q Now, have you worked continuously as a member of Local 25 since 1967?

A That's correct.

Q Now, you say you have been employed as a foreman. Can you tell us what your responsibilities are as a carpenter foreman?

A As a carpenter foreman, I have to place the men in a respective field, and translate the plans to them, whatever is called for, whether it is class A work, framing, or finishing.

Q Now, were you employed by the Dinwiddie-Simpson Company in 1967?

A Yes, I was.

Q Am I spelling this right, Mr. Gillie (indicating)?

557.

A I think it's double "d", instead of double "t"; D-i-n-w-i-d-d-i-e.

Q Dinwiddie Construction Company?

A Dinwiddie-Simpson, yes, as a joint venture.

Q Can you tell us what building they [RT 2069]\*

were constructing\* when you were employed?

A This was known as the Crocker-Citizens Building.

Q What was your position on that project?

A I was the carpenter foreman.

Q That was the Crocker Building?

A Crocker-Citizens Building.

Q Who was the general foreman on that project, or was there more than one?

A We have a superintendent, we had an assistant superintendent, we had a general foreman.

Q All right.

558.

Now, the general foreman was who?  
Was it Larry Buetner?

A No.

Q What was Larry Buetner's position?

A Also a foreman.

Q Mr. Buetner was a foreman, and  
you were a foreman?

A Yes.

Q And do you recall who the superin-  
tendent was?

A Superintendent was Charlie Simpson.

Q And do you recall who was the  
assistant superintendent?

A Fred Coukos.

THE COURT: What is that, Coukos?

THE WITNESS: Yes.

Q BY MR. GEFFNER: Mr. Buetner  
was a foreman, and you were a foreman; is that  
right?

A That's correct.

[RT 2070]

Q And Mr. Simpson was superintendent.

How do you spell Coukos?

A I don't recall the exact spelling.

Q Well, let's say C-o-u-k-a-s.  
That's the assistant superintendent; right?

A Yes.

Q Now, sometime in -- incidentally,  
do you know Mr. Richard Hill?

A Yes.

Q And do you see him here in the  
courtroom?

A Yes.

Q Now, sometime in May of 1967 do  
you recall having a conversation with Mr. Hill?

A Yes.

Q And can you tell us where that  
conversation took place?

A Mr. Hill came to the jobsite, and  
we were on the fifth floor, and he asked me  
whether I would hire him on the job, or I would  
give him a job.

Q Was there anyone else present at this conversation?

A No.

Q Just you and Mr. Hill, okay.

Now, will you tell us your best recollection what you recall Mr. Hill saying to you at that conversation?

A It went like this: "Is there a chance that you can give me a job," or "Can you help me to get on this job?" and I told him that all the hiring was done by the top supervision only, which

[RT 2071]:

in this case was Charlie Simpson or\* his assistant, and I told him --

Q His assistant would be Fred Coukos?

A Yes.

-- and I told him to see Charlie or Fred Coukos, either one of those two, who could tell him whether there was a need or a chance for him to get employment.

Q An other conversation that occurred, that you haven't told us about?

A I only mentioned to him that I was not capable of hiring anyone.

Q Did Mr. Hill then leave, at least your presence?

A Yes, he left with saying, "Well, I'll go and see him," or in that respect.

Q Was that the sum total of your conversation with Mr. Hill at that time?

A That's my recollection.

Q Did you, in that conversation, at any time offer to hire him as a carpenter on that project?

A I had no powers to hire anyone. It was only supervision that could make decisions of that nature.

Q Well, I want to know, Mr. Gillie, specifically, in that conversation did you ever tell Mr. Hill that you could hire him, or you would hire him, or offer him a job.

A I could not.

Q Your answer is no?

A My answer is no.

\* \* \* \* \*



[RT 2084]

JOHN KABAT,

called as a witness by the defendants, being first  
duly sworn, was examined and testified as follows:

\* \* \* \* \*

[RT 2085]

DIRECT EXAMINATION  
BY MR. GEFFNER:

\* \* \* \* \*

[RT 2086]

Now, Mr. Kabat, do you recall being dispatched to a job in May of 1968 -- I know it's a long time -- for the Speer Corporation? It was a home for unwed mothers.

A Yes.

Q And do you recall who dispatched you to that job?

A Well, I get -- I was dispatched from the union, Local --

Q Local 25?

A --25. Same with Dick, Dick Hill.

Q You and Mr. Hill went out to a job together?

A Well, we came at the same time over there.

Q Did you leave the hall together, or did you meet him at the job?

A Together we left, because I didn't know where the job place is, and he drove ahead, and I followed him with my car.

Q And do you recall where the job was located?

A The job was located about -- it was north of Los Angeles, close to Pasadena; between Pasadena and Los Angeles.

[RT 2087]

Q When you arrived on the jobsite where there any carpenters working, or did you see any carpenters working?

A About three carpenters work at this time at the job.

Q And was there a foreman?

A Foreman was there.

Q Do you recall the foreman's name?

A Well, I didn't direct to foreman. Mr. Dick Hill, he went to the forman. He talked to him.

Q Wait a minute.

Do you know his name, Mr. Kabat?

A No, I don't know name of foreman.

Q What kind of job was it, do you remember?

A I don't know exactly, but I know it was one long wall, and this three carpenters that I mentioned before were working on it.

Q Now, did you and Mr. Hill talk to the foreman?

A I didn't talk to foreman, Mr. Dick Hill talked to him.

\* \* \* \* \*

[RT 2088]

Q Okay. Now, tell us to your best recollection, now, your best memory -- we know you can't give us the exact words -- but what did you hear Mr. Hill say, and what did you hear the foreman say? In your own words, what did you hear them say, would you tell us, Mr. Kabat?

A Yes. Well, I heard everything that Mr. Hill talked to the foreman. The job is -- he talked to him, how about job this long, you know, and the foreman said not too long a job, you know. Well, job will not last long.

And Mr. Dick told him that the small job, and it will not last long, so he said, "We shall not take it."

Q Mr. Hill said that?

A Yes.

So he told me, "Let's go back to the hall," you know, so we drove to the hall back.

\* \* \* \* \*

[RT 2096]

EVERETT TRIMBLE,

called as a witness by the defendants, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GEFFNER:

\* \* \* \* \*

Q BY MR. GEFFNER: Mr. Trimble, you said you were then on the Dinwiddie job, which started approximately when, 1967?

A I believe it was '67, yes.

Q And you were steward on that job?

A That's right.

\* \* \* \* \*

[RT 2108]

FRED HARRY COUKOS,

called as a witness by the defendants, being first  
duly sworn, was examined and testified as follows:

DIRECT EXAMINATION  
BY MR. GEFFNER:

\* \* \* \* \*

[RT 2110]

And in your position as superintendent,  
were you employed by the Dinwiddie-Simpson job  
regarding the Crocker-Citizens Building?

A Yes, sir. This was a joint  
venture between William Simpson Construction  
Company and Dinwiddie, and I was employed as  
a superintendent -- assistant superintendent.

Q Can you tell us approximately  
when you started or were assigned to that job  
project?

567.

A '67 to '68.

Q Do you recall when in '67 you  
started?

A I believe it was around October.

Q '66 or '67?

A October of '66.

Q And how long were you on that  
project?

[RT 2111]

A About two and a half years.

Q Now, as assistant superintendent,  
did you have any responsibility in requesting  
carpenters to be employed?

A Yes, sir.

Q And in what capacity did you have  
that responsibility? -- that's not a clear question.

Tell us, what was your responsibility in  
terms of hiring carpenters?

A When it was necessary to hire  
more help I would call the union hall and request  
the amount of people that I needed at the time.

568.



MR. GEFFNER: Your Honor, we are missing exhibit R, so I will pass that question.

THE COURT: What exhibit?

MR. GEFFNER: Exhibit R -- oh, here they are, save me a lot of time.

MR. HOBART: All you had to do is say it, and it would be in your hand, Mr. Geffner.

Q BY MR. GEFFNER: Mr. Coukos, we have defendants' exhibit R here, which are job requests by name from the Dinwiddie Construction Company, William Simpson Construction Company, joint venture, and there's a whole series of requests by name, and your name appears on a large number of them; is that correct, is that your signature?

A Yes, sir.

Q Do you recall the arrangement, if there was one, regarding the method that supervision was to hire carpenters by name under the 25-percent rule?

[RT 2112]

A Mr. Charles Simpson, who was the general superintendent at the time, wanted us to write the requests -- to make out the requests in writing to send to the hall.

Q Would that be the 25-percent group?

A The 25-percent group, yes.

Q What was your understanding as to the 25-percent rule on that job, as well as other jobs?

A Well, we were allowed to hire 25-percent, or request by name carpenters.

Q Under the contract?

A Sir?

Q Under the Collective Bargaining Agreement?

A Yes, sir.

Q Now, Mr. Coukos, in your position as assistant superintendent, did you have the responsibility over all craftsmen, or just carpenters?

A Well, all craftsmen.

Q And that would include approximately how many workmen at any one given time on that project?

A Well, we had as many as two hundred men there at one time.

Q That would be various crafts?

A Yes, sir.

Q And what was the top number of carpenters that you had employed on that job?

A I believe it was somewhere in the seventies.

Q Now, do you know Mr. Everett Trimble?

A Yes, sir.

[RT 2113]

Q And did Mr. Trimble ever work for you?

A Yes, sir.

\* \* \* \* \*

[RT 2115]

CROSS-EXAMINATION  
BY MR. HOBART:

\* \* \* \* \*

[RT 2122]

Mr. Simpson testified that on that job you had both oral and written requests, and that had been a common occurrence on that Simpson-Dinwiddie job. Do you have a recollection of that, sir?

A Yes.

[RT 2123]

Q Sometimes they would be in writing, sometimes they would be over the telephone

A Well, normally they were in writing. That was the rule that was made, and --

Q I think that is what Mr. Simpson said, that that was normally the case, but that there were exceptions to that rule, telephone requests.

In other words, you'd call, when you'd call into the union, say, the night before, say, "Give us X number of carpenters tomorrow, and make one or two of them so and so and so and so," that that was not an uncommon thing; isn't that true?

A It's true until we reached that 25 percent. After that we would just call the hall and they'd send out the men off their list, or whatever.

Q Right, we're talking about two things. In other words, you could make the requests up until the time the company had requested 25 percent of the people, then after that you couldn't make individual requests any more?

A That's correct, yes, sir.

Q All right. But up to the 25 percent, the fact of the matter is that you made requests on that job of both oral and written nature?

A Yes.

\* \* \* \* \*

[RT 2124]

REDIRECT EXAMINATION  
BY MR. GEFFNER:

Q Mr. Coukos, Mr. Daley testified that he had an agreement with Mr. Simpson that within the 25 percent requests -- not on rehires, or not on transfers -- but on the 25 percent, that the requests would be by name. Does that refresh your recollection in any way of any arrangement on that particular job?

A Yes, sir, that was the ruling that was set up.

573.

Q Is that your recollection?

A Yes, sir.

Q Would you agree with Mr. Daley that's what it was?

A Yes.

\* \* \* \* \*

[RT 2125]

RECROSS-EXAMINATION  
BY Mr. HOBART:

Q There were oral requests that were honored on that job, and there were written requests that were honored on that job, irrespective of whatever the agreement had been; isn't that so?

A There may have been a few verbal requests.

\* \* \* \* \*

EVERETT TRIMBLE,

called as a witness by the defendants, being previously sworn, resumed the stand and testified further as follows:

DIRECT EXAMINATION (Resumed)  
BY MR. GEFFNER:

\* \* \* \* \*

574.



[RT 2130]

Q Now, Mr. Trimble, when you were working on the Dinwiddie-Simpson job around May 1st, 1967, do you recall a conversation involving Mr. Coukos and Mr. Hill?

A Yes, I do.

Q And would you tell us, were you present?

A Yes, I was.

Q Can you tell us the circumstances of how you happened to be present?

A Well, I had came down from the 6th floor, and they had the saw shop down on the ground floor, so I went down there to pick up the saws to take up to the men, and I was starting back up. I stopped to say a word to Fred Coukos about the assignments and jobs.

Q Did you talk to Mr. Coukos frequently in that job?

A Yes, I did.

Q How many times a day would you say you spoke to him?

A Oh, probably four or five times a day.

And as I was going back I stopped to talk

[RT 2131]\*

to him,\* and Mr. Hill came in about that time, and I introduced him to Fred Coukos, and he --

Q You knew Mr. Hill, of course. He was vice-president at that time?

A Yes.

So he asked Fred Coukos for a request to go to work, and Fred told him he wouldn't give him any, he didn't want him on the job.

Q Do you recall anything else about that conversation?

A That's about all they said there at that time. I went on upstairs.

\* \* \* \* \*

[RT 2132]

Q At the stewards' meeting did you ever hear any conversation between Mr. Daley and Mr. Hill?

A Oh, yes.

Q And in terms of the two of them, I assume there were a number of men present?

A Yes.

Q But in terms of the conversation between the two of them, can you give us some

[RT 2133]\*

of your recollections of? what you heard?

MR. HOBART: Can we have the time this occurred, your Honor?

THE COURT: '65, I think.

MR. GEFFNER: And '66, your Honor.

THE COURT: And '66.

THE WITNESS: Well, they would -- they would have this meeting. Whoever was on the floor, if it was one of the agents or some of the attorneys, or Mr. Hill would jump up and go to interfering with the speech, and Daley would ask him to sit down, and if he didn't sit down, why, Daley would tell him in a pretty rough way to sit down. That was his nature of talking. He talked that way. He was rough talking.

Q BY MR. GEFFNER: And did Mr. Hill answer back?

A Well, yes. Lots of time he would, but then I don't remember what he would say. He talked so fast that I couldn't keep up with him.

Q Now, did you attend the membership meetings during '67?

A Yes, I did.

Q And '68?

A Yes. Yes, I did.

Q Of course, you were president from June of '68 on, were you not?

A Yes.

Q During the period of '67 when you were not president, up to June of '68 did you

[RT 2134]\*

attend any of those meetings\* during that time?

A I attended all the meetings.

Q And Mr. Nelson was present, was he not?

A Yes.

Q Do you recall any conversation at the membership meetings between Mr. Hill and Mr. Daley?

A Well, I don't -- yes, I recall the conversations, but then I don't remember --

Q Well, in general terms.

A General terms, yes.

Q Any discussions, or what was it, is what I'm trying to find out.

A Well, really, I don't know what was said, but Hill would interfere if any of them got up on the floor.

Q And Mr. Daley would say what to him, usually?

A Pardon?

Q What would Mr. Daley say to Mr. Hill?

A He would tell him to sit down or he'd throw him out of the building -- put him out of the hall, rather.

Q Is that what he said?

A Yes.

Q Did Mr. Hill keep talking?

A Talking too much, interfering with the men.

Q Now, when you were president, that was in June of '68, was it not?

A Yes.

Q In June of '68 until April of '69 did Mr. Hill attend any of the meetings?

[RT 2135]

A Yes.

Q And in terms of conducting the meetings, would you tell us, what would Mr. Hill say or do, if anything.

A Well, when I was president, yes, he would. When I was first president, why, he didn't say anything for a short time, but then he began to interfere with me and the men that would get up on the floor to make speeches.

He'd interfere with all of us, but I don't recall what was said, only he -- I threatened to fine him one time, but I didn't assess a fine on him.

\* \* \* \* \*

[RT 2180]

LEO EARL POUNDSTONE,

called as a witness by the defendants, being first duly sworn, was examined and testified as follows:



\* \* \* \* \*

DIRECT EXAMINATION  
BY MR. GEFFNER:

Q Mr. Poundstone, what is your occupation?

A I am a construction superintendent.

\* \* \* \* \*

[RT 2183]

Q And when was the first time you saw or met Mr. Hill, approximately?

A Well, during the middle of the month of January of 1969.

Q Sometime in January or February?

A Yes, sir, one of those two. I'm fairly sure it was in January, but could have been in February.

Q All right. So you say that was in '69?

A Yes, sir.

Q Okay. Let's say January or February; is that fair enough?

A Yes, sir.

581.

Q And that was the Kidde job?

[RT 2184]

A Yes, sir.

Q Now, during that time, Mr. Poundstone, did you spend much of your time during the day at the project?

A All the time from 6:00 o'clock in the morning until 4:00 o'clock in the afternoon.

Q All right.

Now, up to that time had you ever seen or heard or known anything about Mr. Richard Hill?

A No.

Q Would you tell us, did you have a conversation with Mr. Hill at that time?

A I did.

Q And where was this conversation?

A On that property there, the property which we had taken possession of by virtue of a permit from the City of Los Angeles for parking and traffic; on the project.

\* \* \* \* \*

582.

[RT 2188]

Q Mr. Poundstone, I believe I was asking you where you first saw Mr. Hill.

A That is true.

Q Will you tell us where you first saw him?

A Yes. I was eating breakfast in a restaurant across the corner from the project that I was working on in 1969. I don't recall the name of the restaurant.

Q About what time of the morning was it?

A 6:00 o'clock. I was sitting at the counter, and a man came up, tapped me on the shoulder and said, "When you get through there, I want to see you across the street at the job." When I finished, I went over there.

[RT 2189]

Q Who was the man that said this?

A Mr. Hill -- when I got over to the job I met Mr. Hill.

Q He's the man that tapped you on the shoulder?

A Yes.

When I got over to the job, there was Mr. Hill parked with his car blocking the entrance gates to my project, and he was standing outside of his car, and he said to me, "Leo," he said, "I'm Dick Hill from Local 25, and I came down here to get you straightened out."

He said, "I've been listening to the bullshit stories down at the hall that you've been pulling down here, and I want to get you straightened out on just exactly what's coming off," along those lines.

So I said to him, "Which business agent are you?" and he said, "I'm no God-damned business agent, I'm a member of Local 25, and I'm down here to straighten you out."

So I said to him, "Are you coming down here to go to work?" "I wouldn't work on this God-damned job if I never had a job." So then I informed him that he was parked on my property, being the company representative, and I would give him three minutes to remove himself and his automobile from there, or I would call the police and have him arrested.

To which he says to me, "How does a son of a bitch like you live so long without being shot?" So I turned around to him and said, "Your three minutes are up," and I started to go over to get into my pickup, and he jumped in

[RT 2190]

his car and drove off.

Now, that's the first, the last, and the only time I've ever had anything to do with him.

\* \* \* \* \*

[RT 2522]

JAMES L. KEEN,

called as a witness by the defendants, being first duly sworn, was examined and testified as follows:

\* \* \* \* \*

[RT 2523]

DIRECT EXAMINATION

BY MR. GEFFNER:

Q Mr. Keen, what is your occupation?

A Financial secretary, Carpenters'  
Local 25.

\* \* \* \* \*

[RT 2542]

Q BY MR. GEFFNER: Yes, concerning yourself with just the '67, '68 period, tell us what you heard.

585.

A Well, Mr. Hill was standing at the

[RT 2543]\*

window copying\* notes and yelling through the window at Mr. Daley, and naturally, it gets on a person's nerves, and he'd yell back. He'd tell him to get away from the window so he could get the dispatching done.

Q What did you hear Mr. Hill say during those incidents?

A He'd call him drunken bum, and all sorts of things like that.

Q What did you hear Mr. Daley say?

A He'd just tell him, "Get the hell away from the window so I can get my work done."

Q Was that sort of a normal routine, as far as you could observe?

MR. HOBART: Your Honor, I will object to the question as being leading.

THE COURT: Yes, I will sustain the objection.

MR. GEFFNER: All right.

Q How often would you say that type of dialogue would take place?

586.



A Practically every day.

\* \* \* \* \*

[RT 2630]

JOSEPH ANDREW WILK,

called as a witness by the defendants, being first  
duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. GEFFNER:

\* \* \* \* \*

[RT 2635]

Q Now, Mr. Wilk, during the year  
1967 -- that's the last year you were in office  
for the full year -- do you remember seeing Mr.  
Hill during that year socially?

A I do, very much so.

The same thing happened. We visited,  
frequently drinking, very much so; drinking and  
dining together.

\* \* \* \* \*

[RT 2636]

Q BY MR. GEFFNER: Now, during  
the years of '66, '67, '68, did you dispatch along

587.

with Mr. Daley?

A Yes, I did.

Q And Mr. Fenwick?

A Yes, I did.

Q How would that work, in terms of

[RT 2637]\*

who would handle\* the actual job of dispatching?

A Well, any man that was there.  
First man there, or one of the others were busy  
on the telephone, taking care of other business,  
or taking roll call, first man that was in the  
office took care of that.

Q How about requests from employers?

A Well, requests from employers  
came in either by letter, by note, or by their  
business card.

Q And what was the practice in  
honoring requests by name?

A Well, as far as I was concerned,  
and the officers was concerned, was by the  
same method, only they also had to show us a  
check stub that they worked for the previous  
employer.

588.

Q What was the purpose of showing you the check stub?

A That they -- to identify themselves that they worked for the previous employer, to get the request, and the request was granted.

Q Did you fill out a referral slip then?

A Yes, sir, I'd fill out a referral slip, and that's how we sent them to work.

Q After you were dispatching in the morning, what would be your duties for the rest of the day?

A We'd go out in the field.

Q Check out --

A Visit various jobs, various contractors that requested us to come out there on the various jobs.

[RT 2638]

Q All right.

During 1967, to your best recollection, did you ever refuse to send out Mr. Hill when his name came up?

A Never.

Q Did his name come up?

A His name came up and he refused to go to work.

Q What were the reasons he would give you?

A He'd give me no reason at all, just refuse to go to work, and he'd walk away, and he'd just -- he said, "You dumb Polack" -- he had a nasty habit that way.

He'd be smoking a cigar, be blowing the smoke in your face through a little, like a port-hole in the window from the dispatching, and was very abusive.

Q Did you ever answer him back?

A No. I asked him to excuse himself. I said, "Please excuse yourself while we take care of the business, then if you want to talk to me, all right."

Q Did you ever hear Mr. Daley and Mr. Hill have any discussions?

A Oh, yes. I heard him pretty good, both of them cussing one another out.

In fact, that was Mr. Daley's way of doing things. He's well known for that, for doing that; But for Mr. Hill, to me, it was very unusual. I didn't think it was the right thing. I told him so.

# APPENDIX

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## IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75 - 804

JOY A. FARMER, Special  
Administrator of the Estate  
of Richard T. Hill,

Plaintiff-Petitioner,

vs.

UNITED BROTHERHOOD OF  
CARPENTERS AND JOINERS  
OF AMERICA, LOCAL 25,  
et al.,

Defendants-Respondents.

---

ON WRIT OF CERTIORARI TO THE  
CALIFORNIA COURT OF APPEAL  
SECOND APPELLATE DISTRICT,  
DIVISION FIVE

---

PETITION FOR CERTIORARI  
Filed December 5, 1975

CERTIORARI GRANTED  
January 26, 1976



## APPENDIX

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PETITION FOR CERTIORARI  
Filed December 5, 1975

CERTIORARI GRANTED  
January 26, 1976

Vol. IV of IV  
Exhibits

*Walter Kiddle - 313 N. Figueroa*  
Speediset® Moore Business Forms, Inc. *Foreman*

## WORK REFERRAL

LOS ANGELES COUNTY  
DISTRICT COUNCIL OF CARPENTERS

G. A. MC CULLOCH  
SEC'Y., TREAS.

F 9437

DATE *1-27-69*

INTRODUCING  
MR.

*Kenneth MURRAY*

SOCIAL  
SECURITY NO.

*278-32-7704*

MEMBERS  
LOCAL #

*769*

NAME OF EMPLOYER

FOREMAN OR SUPT.

JOB SITE ADDRESS

CITY

REMARKS

NOTE: THIS WORKMAN IS DISPATCHED AS SPECIFIED BY YOUR REQUEST. BY THE ACCEPTANCE OF THIS REFERRAL AND THE EMPLOYMENT OF THIS WORKMAN, YOU AGREE TO BE BOUND BY THE TERMS AND CONDITIONS OF THE "MASTER LABOR AGREEMENT", COVERING CARPENTERS AND ALLIED BUILDING CONSTRUCTION TRADES, AND AGREE TO PAY UNION WAGE RATES AND MAKE HEALTH AND WELFARE, PENSION, VACATION AND APPRENTICESHIP FUND CONTRIBUTIONS REQUIRED BY THE AGREEMENT. THE CURRENT SCALES AND RATES ARE:

WAGE SCALE	
HEALTH & WELFARE CONTRIBUTION	36¢ PER HR.
PENSION BENEFIT CONTRIBUTION	45¢ PER HR.
VACATION FUND CONTRIBUTION	25¢ PER HR.
APPRENTICESHIP TRAINING CONTRIBUTION	14¢ PER HR.

BY

AUTHORIZED REPRESENTATIVE

LOCAL NO.

PHONE

ANY MEMBER ACCEPTING THIS REFERRAL AND NOT REPORTING TO THE JOBSITE MUST IMMEDIATELY NOTIFY THE OFFICE OF THIS LOCAL UNION.

REPORT TO STEWARD  
BEFORE GOING TO WORK

EMPLOYER'S COPY

EXHIBIT 1  
Work Referral Slip

P-1  
LIST #1

10-28-68  
For workmen who HAVE performed work of the type covered by the Master Labor Agreement in the geographic area of the Labor Agreement within the past five years.

Los Angeles County District Council of Carpenters

EMPLOYMENT LIST

DATE	No.	PLEASE PRINT NAME	LOCAL NO.	HOUSING		COMMERCIAL		CONCRETE	REMARKS
				ROUGH	FINISH	FRAMING	FINISH	FORMS	
		Julius W. Inge	25						
		RAY SCRANTON	25						
		D. FONSECA	25						
		J. CORTE	25	✓					
		HOWARD WELFE	25					X	
		John EARLE	25	✓					
		Walter P. ...	25						
		BILL LARSON	25						
		H. O'LEA CARLSTROM	25	✓					
		Charlie Abram	25	✓					
		Levon Martin	929					X	
		HUGH Williamson	25	X					
		Harry Manning	25	X					
		Vincent Behrens	769					X	
		FRANCOIS DIONNE	25		X				
		Dennis Powell	25						
		Levi Delaney	25	X	X	X	X	X	no work
		Herbert Zimmerman	25					✓	
		Archie Ee's	25					✓	
		J. W. Vercher	25					✓	
		WILLIAM KEMMER	25					X	

HEARING  
CAS. NO. 951866  
EXH. NO. 2  
ADMITTED IN EVIDENCE  
DATE 12/20/72  
BY WILLIAM O. CHAPPELLE, COUNTY CLERK  
DEPUTY

Sgt MA 58515  
Sawman -

EXHIBIT 2

Out of Work List (first of 19 pages)

# LOS ANGELES COUNTY DISTRICT COUNCIL OF CARPENTERS

2200 W. 7th ST., LOS ANGELES (57)

WILLIAM SIDELL, Sec'y-Treas.

*Start*  
**CARPENTER'S**

**HIRING HALL**

**PROCEDURES**

The following procedures are placed in effect at the dispatching offices of all affiliated Local Unions under the jurisdiction of the Los Angeles County District Council of Carpenters.

Dispatchers and other agents of the Local Union have no authority to change any of these procedures, due to the fact that the following procedures fulfill the terms of the written Labor Agreements under which the employers have agreed to obtain workmen through the dispatch offices of the Local Union to the extent that such workmen can be furnished, before the employers may seek workmen elsewhere. The Los Angeles County District Council of Carpenters has such contracts covering employers affiliated with the Southern California chapter of A. G. C., B. C. A., E. G. C. A., H. B. A. and other agreements of the same kind with other employers.



EXHIBIT 3  
Hiring Hall Procedures

## ORDER OF PREFERENCES

1. Each Local Union at its Dispatch Office shall maintain two (2) lists of registrants for work, kept current from day to day. List No. 1 will cover Order of Preferences (a) and (b) and List No. 2 will cover Order of Preferences (c). The establishment of two lists is for the purpose of separating those registered who have preferential hiring by working for a contractor within the five (5) years immediately preceding the employer's request for employees and who have performed work of the type covered by the Labor Agreement in the geographic area of the Agreement, provided they are available for employment. This does not preclude the direct request for workmen under provision (a) on rehiring. List No. 2 is to distinguish those workmen who have not worked for a contractor performing the type of work covered by the Labor Agreement in the geographic area of this Agreement, such as members coming from other states, or members coming from other areas outside of the collective bargaining agreement of the Eleven Southern Counties, or other qualified workmen.

(a) Workmen specifically requested by name, who have been laid off or terminated as journeymen carpenters by the requesting employer in the geographic area of the Local Union, or the Los Angeles County District Council of Carpenters, within 3 years before such request by the employer desiring to re-employ the same workmen, providing they are available for employment.

(b) Workmen in order of their registration, who within the five (5) years immediately preceding the employer's request for employees have performed work of the type covered by the Labor Agreement in the geographic area of the Labor Agreement, provided they are available for employment.

(c) Workmen in order of their registration, who are entered on the list of the Local Union, and who are available for employment.

In connection with Order of Preferences (b), the Labor Agreement allows up to 25% of the employees, excluding foremen, employed to perform work covered by the Labor Agreement on any project, and they may be employees designated by the requesting employer.



## 2. OPERATION OF REGISTRATION LIST.

(a) Dispatching hours shall be from 7:30 a.m. to 9:00 a.m. daily (Monday through Friday). Roll Call shall be held Monday morning of each week at 7:30 a.m. or immediately after dispatching unless otherwise notified. In emergency cases where life or property are in imminent danger, men may be dispatched other than at regular dispatching hours, if it is designated by the contractor that such emergency exists or if a bona fide request is received in accordance with Order of Preference (a) of the Hiring Hall Procedures.

(b) The workman shall personally sign and classify himself on the employment list.

(c) It is the prerogative of the dispatcher to make determination of the workman's qualification as to a particular classification if in the past the workman's record indicates that he is not competent and skilled in the classification needed by the employer.

(d) Registered workmen shall be removed from their position on the registration list for the following reasons:

- (1) Failing to answer roll call at designated time.
- (2) The workman has been dispatched to a job. However, in the event the workman is rejected by the employer, such workman shall retain his previous position on the list. No workman who is rejected or discharged by the requesting employer shall be re-referred to the same employer with respect to the same job to which he was initially referred.
- (3) The Registered workman fails to accept suitable employment on two (2) occasions during the current week of his registration.
- (4) The Registered workman is unavailable for employment during the current week of his registration.
- (5) The dispatched workman fails to report to a jobsite.

(e) The dispatched workman will be reinstated on the list in the event the job to which he is dispatched is less than two (2) full days duration.

## 3. WORK DISPATCH PROCEDURES.

(a) Jobs shall be dispatched under a daily rotation system by classification. Job dispatch preference would start at the top of the registration list each day.

(b) This would apply to each work classification as specified by the individual himself.

(c) Work referrals would be issued off the list in numerical order until that classification job is filled. This procedure would be followed until all work orders were filled that day during the proper dispatching hours. This procedure would be repeated each day.

### GENERAL DISPATCHING PROCEDURES

1. No workman shall be refused registration or dispatchment because of his union membership or lack of union membership or union good standing if such workman is otherwise entitled to registration and dispatchment. The Union shall register and dispatch workmen for employment without discrimination as to Union affiliation, and such registration and dispatchment shall not be affected in any way by rules, regulations, By-Laws, Constitutional provisions or any other aspect or obligation of Union policies or requirements.

2. Financial good standing in the Union can be required as a condition of dispatchment for workmen who are required to become members of the Union as a condition of employment under the Labor Agreement. Financial good standing refers only to the payment of initiation fees, reinstatement fees after non-payment of dues and regular dues. Applications and the payment of fees may be accepted for any workman who has not been employed by one or more of the contractors for a period of eight (8) days, who voluntarily desires to apply for membership, transfer or reinstatement.

3. In order to be entitled to registration, an applicant must be currently unemployed.

4. A written job referral slip will be given to each workman dispatched to a job.

5. The employee shall supply, if necessary, the information and papers necessary to show his work experience. If any doubt exists as to the employee's order of preference, the Dispatching Agent may call prior employers or make any other prompt investigation to ascertain the needed facts.

6. In order to be "available for work" the registering employee must be ready, able and willing to go to the jobsite at the time required and perform the work for which he is being dispatched.

7. All workmen who have registered shall be present at the Local Union dispatching office during regular dispatching hours. In cases where Local Unions have Countywide area jurisdiction or jurisdiction outside of Los Angeles County, provisions may be provided where individuals eligible can be reached by telephone, if they live in a remote area or due to extenuating circumstances cannot personally be present.

8. The Dispatching Agent must make appropriate notations showing the job and classification to which the workman has been dispatched or if he has not been dispatched, the reason why he has not been dispatched. If the employee inquires, he shall be given exactly the same information as appears on the notation.

9. If any employee, regardless of his Union membership or non-membership or standing in the Union, questions the application of these rules in any manner regarding his registration or dispatchment or non-dispatchment, he will be referred to the Los Angeles County District Council of Carpenters, 2200 West Seventh Street, Los Angeles, California. He will be given the name, address and telephone number of the person to contact, where he can obtain a prompt review of the matter. The Dispatching Agent shall advise him that he is entitled to such a review and without delay. He shall be further advised that it is his responsibility to make the request for the review with the person and at the office specified by the Dispatching Agent.

10. In any case which may lead to a misunderstanding or dispute, the Dispatching Agent should immediately make complete notes on the facts upon which the decision was made regarding the particular employee.

11. The Local Unions and the Los Angeles County District Council of Carpenters shall post in places where notices to applicants for employment with individual employers are customarily posted, provisions relating to the dispatching procedures.

Any dispensation from these Hiring Hall Procedures must be approved by the Executive Committee and the District Council of Carpenters.

TYPE OF HEARING \_\_\_\_\_  
CASE NO. 95 1866  
pepps EXH. NO. 13  
**ADMITTED IN EVIDENCE**  
DATE 12/20/72  
WILLIAM G. SHARP, COUNTY CLERK  
BY Terry C. Chappell DEPUTY

— — — — — THE LOS ANGELES County Joint Apprenticeship Committee composed of labor and management representatives.

(b) Persons who have previously been employed as journeymen carpenters and have had qualifying practical working experience within the industry.

(c) Persons who do not belong to any of the above classifications and who have passed an examination conducted by the Examining Committee.

**2. Journeyman Examination.** The examinations to determine a journeyman carpenter who is a qualified and competent workman shall be held on Thursday of each week at 8:00 A.M. at the office of the District Council of Carpenters, 2200 West Seventh Street, Los Angeles 57, California. An applicant for the examination will be referred, without discrimination in any manner, by a Local Union representative and the applicant will be notified as to the time, date and place of the examination. The examination will consist of practical identification questions in the general field of carpentry, hardware, tools of the trade, and multiple choice questions. A score of 75% shall be a passing mark, and, if such mark is made by the applicant, the Examining Committee shall, without delay, refer the applicant to the Local Union with an acceptance notice. In the event a passing mark is not reached by the applicant, the Examining Committee shall refer the applicant back to the Local Union with a notice of non-acceptance.



3. **Examining Committee.** There shall be established an Examining Committee which shall be appointed by the District Council and shall consist of three representatives of the Local Unions.

The Examining Committee shall meet on Thursday of each week at the offices of the District Council of Carpenters and shall review examinations taken by applicants on that day and shall refer each applicant without delay to the Local Union with either an acceptance or a non-acceptance referral. The Examining Committee shall conduct the examination for applicants in a fair and impartial manner and in keeping with the present standards of competency and skill possessed by journeymen in the industry. The Examining Committee shall keep a file of all written examinations given and of the answers received and the results of the tests and its determination of whether or not each applicant has passed.

4. **Appeal.** There shall be established an Appeals Review Board which shall consist of one representative from the Union and one representative of the Contractors and one representative selected by the Union and the Contractors' representatives from the office of the California Division of Apprenticeship standards. In the event no person is available from the State Division, then the Union and the Contractors' representatives shall select a third representative for the Appeals Review Board who is not associated with either the Union or the Contractors. Such third representative shall be appointed for a period of one year and shall be paid compensation if required. Such expense shall be borne mutually by the Union and the Contractors.

The Appeals Review Board shall meet at least once every three months to review the fairness and competency of the journeymen examinations or within three days upon the filing of an appeal.

In the event any applicant takes exception to the Examining Committee's recommendation as to the result of the examination, or to the fairness or competency of the examination, then such applicant shall have the right of appeal to the Appeals Review Board.

Any applicant desiring to appeal from the recommendation of the Examining Committee shall, in writing, within 48 hours of the Examining Committee's recommendation, file such appeal with the Appeals Review Board whose offices shall be Los Angeles County District Council of Carpenters, 2200 West Seventh Street, Los Angeles 57, California. Room 200.

Upon an appeal being filed, the Appeals Review Board shall meet within three days after receipt of such appeal and review the applicant's examination and determine whether the recommendation of the Examining Committee shall be affirmed or reversed. The decision of the Appeals Review Board shall be final and binding on the Union and the Contractors and the applicant. In the event there is a difference of opinion by the members of the Appeals Review Board, the decision of the third member not representing the Union or the Contractors shall be final and conclusive.

5. Any applicant that fails to obtain a satisfactory grade in the examination shall not be eligible to take the examination again for a period of six months from the date of the examination taken by him.

6. No provisions of this article or any rules or regulations hereafter adopted by the Examining Committee or the Appeals Review Board, or any decision of the Examining Committee or Appeals Review Board, shall be based on, or in any way affected by, Union membership, by-laws, regulations, constitutional provisions or any other aspect or obligation of Union membership, policies or requirements, notwithstanding any other provision or article or any by-laws or constitutions or trade rules of the Union.



CARPENTERS LOCAL

25

Date

1/8/69

III-

We wish to employ Mr.

Phil Rade

S.S. #

553-82-8614

Pursuant to Article II, paragraph 204.4.1 of the Master Labor Agreement, we warrant and represent that he has been laid off or terminated by the undersigned from employment covered by the Agreement and in the area served by your employment facility within 3 years immediately preceding this date.

Employer

Huffman Const. Co.

Requested by

Mike Young

Carp. Sec.

PHONE

Jobsite address

Rick &amp; Theresa

L.A.

TITLE

CITY

FORM 100 -

EXHIBIT 4  
Employer's Request

CARPENTERS LOCAL No. 25

Date

9-2-68

Firm

Genite Const Co.

Address

29th &amp; Bristol

By

John Adams

Type of Work

Framing

No. of Men

2 Carpenters

Report To

John Adams

LEONARD MANUEL #1 25

SALES ROLL #1 25

(2 weeks work)

By

L. S. P.

Business Representative

EXHIBIT 5  
Telephone Request

# LIST #1

For workmen who HAVE performed work of the type covered by the Master Labor Agreement in the geographic area of the Labor Agreement within the past five years.

Los Angeles County District Council of Carpenters

## EMPLOYMENT LIST

DATE	No.	PLEASE PRINT NAME	LOCAL NO.	HOUSING		COMMERCIAL		CONCRETE	REMARKS
				ROUGH	FINISH	FRAMING	FINISH	FORMS	
		DAN ATWOOD	25				X		TYPE OF HEARING <i>2nd</i>
		H H MITCHELL	25	X					CASE NO. <i>921806</i>
		WALTER PERRYMAN	25						EXH. NO. <i>7</i>
		ALBERT DANIELS	25						ADMITTED IN EVIDENCE
		W H ELLIOTT	25						DATE <i>DEC 26 1972</i>
		H R & LAWSON	25						WILLIAM G. SHARP, COUNTY CLERK
		J. W. DOWNS	25						<i>William G. Sharp</i> DEPUTY
		ELMER EBBE	25			X	X		foreman & sawman
		JOHN GOSSY	25		X		X		remodel
		A. BAXTER	25						remodeling
		WILLIS WASHINGTON	25						sawman foreman
		WILLIAM FLEMING	25				X		
		BO B LEVY	25				X		remodel
		KENNETH S. ROGERS	25						TUE
		J. LINDQUIST	25						
		JIM FLYNN	25					X	TUE
		E. J. ELIE	25						
		CLARENCE DECKELMAN	25						
		HOWARD WOLFE	25	X					
		JOE SCOTT	25						
		Claude C. Cowell Sr	25						supt or foreman

FORM 300-10M

EXHIBIT 7 - Out of Work List  
(first of 18 pages)

3-27-67

**LIST #1**

For workmen who HAVE performed work of the type covered by the Master Labor Agreement in the geographic area of the Labor Agreement within the past five years.  
**Los Angeles County District Council of Carpenters**  
**EMPLOYMENT LIST**

DATE	No.	PLEASE PRINT NAME	LOCAL NO.	HOUSING		COMMERCIAL		CONCRETE	REMARKS
				ROUGH	FINISH	FRAMING	FINISH	FORMS	
		Dan Atwood	25				X		
		H. H. Mitchell	25						
		Walter Perryman	25	X					TUE
		Albert G. Daniels	25						
		W. H. Elliott	25		X		X	X	stair
		H. R. Lawson	25					X	
		J. W. Downs	25						
		Elmer Ebbe	25						FORMAN & SAWMAN
		John Gossy	25			X	X		remodel
		A. Baxter	25		X		X		remodeling
		Willie Washington	25						sawman foreman
		William Fleming	25				X		
		Bob Levy	25				X		remodal
		Kenneth S. Rogers	25						TUE
		John Flynn	25					X	TUE
		J. Lindquist	25						
		E. J. Elie	25						
		Howard Wolfe	25	X					
		Joe Scott	25						
		Clarence Dickelmann	25						
		Claude C. Cavell Sr.	25						supt or foreman

TYPE OF HEARING *oral*  
CASE NO. *51860*  
EXH. NO. *8*  
**ADMITTED IN EVIDENCE**  
DATE *DEC 26 1972*  
WILLIAM G. SHARP, COUNTY CLERK  
BY: *Irma R. Smith* DEPUTY



**WORK REFERRAL**  
LOS ANGELES COUNTY  
DISTRICT COUNCIL OF CARPENTERS

G. A. MC CULLOCH  
SEC'Y.. TREAS.

**B 8201**

DATE 3 Jan 67

INTRODUCING  
MR.

Richard Hill

SOCIAL SECURITY NO. 147-10-5495 MEMBERS LOCAL NO. 25

NAME OF EMPLOYER  
Novell Corp

FOREMAN OR SUPT.  
943 W. 34th St

JOB SITE ADDRESS  
Los Angeles

REMARKS

Mr Henry

NOTE: THIS WORKMAN IS DISPATCHED AS SPECIFIED BY YOUR REQUEST. BY THE ACCEPTANCE OF THIS REFERRAL AND THE EMPLOYMENT OF THIS WORKMAN, YOU AGREE TO BE BOUND BY THE TERMS AND CONDITIONS OF THE "MASTER LABOR AGREEMENT", COVERING CARPENTERS AND ALLIED BUILDING CONSTRUCTION TRADES, AND AGREE TO PAY UNION WAGE RATES AND MAKE HEALTH AND WELFARE, PENSION, VACATION AND APPRENTICESHIP FUND CONTRIBUTIONS REQUIRED BY THE AGREEMENT. THE CURRENT SCALES AND RATES ARE:

WAGE SCALE 5.09  
HEALTH & WELFARE CONTRIBUTION 26¢ PER HR.  
PENSION BENEFIT CONTRIBUTION 30¢ PER HR.  
VACATION FUND CONTRIBUTION 15¢ PER HR.  
APPRENTICESHIP TRAINING CONTRIBUTION 1/4¢ PER HR.

BY G. A. McCulloch LOCAL NO. L.C.  
AUTHORIZED REPRESENTATIVE

PHONE

ANY MEMBER ACCEPTING THIS REFERRAL AND NOT REPORTING TO THE JOBSITE MUST IMMEDIATELY NOTIFY THE OFFICE OF THIS LOCAL UNION.

**REPORT TO STEWARD  
BEFORE GOING TO WORK**

UNION COPY

EXHIBIT 16, Work Referral Slip

**LIST #1**

For workmen who HAVE performed work of the type covered by the Master Labor Agreement in the geographic area of the Labor Agreement within the past five years.

Los Angeles County District Council of Carpenters

**EMPLOYMENT LIST**

EMPLOYMENT LIST				HOUSING		COMMERCIAL		CONCRETE		TYPE OF HEARING	
DATE	No.	PLEASE PRINT NAME	LOCAL NO.	ROUGH	FINISH	FRAMING	FINISH	FORMS			
		Walter Perryman ✓	25								
		Albert Baxter ✓	25								
		Earl Harfield ✓	25								
		HOWARD B. FOSTER ✓	25								
		"Olee" Carlstrom ✓	25								
		Victor Monquist ✓	25								
		Bill C. Ferrone ✓	25								
		Robert Telford ✓	25	X	X	X	X	X			
		Archie Mednick ✓	25				X				
		Mark Bogard ✓	25								
		William Fleming ✓	25				X				
		E. H. Wallace ✓	25				X				
		Victor Wall ✓	25								
		W. Weaver ✓	25								
		James Crosby ✓	25								
		Francis Gekring ✓	25								
		PALMER LANGRISH ✓	25				X				
		S. Mednick ✓	25								
		Herschel Speckley ✓	25								
		R. G. Storer ✓	25								
		Walter T. Ford ✓	25								

CASE NO. 151856  
EXH. NO. 18  
ADMITTED IN EVIDENCE  
DATE 12-27-72  
WILLIAM G. SHARP, COUNTY CLERK  
BY: [Signature] DEPUTY

Sawmen

Remodeling

Foreman

FORM 300-10M

EXHIBIT 18, Out of Work List  
(first of 12 pages)

04/18

CASE NO. 051855  
EXH. NO. 18  
ADMITTED IN EVIDENCE  
DATE 12-27-72  
WILLIAM G. SHARP, COUNTY CLERK  
BY: Ernie L. Smith DEPUTY

Sawmen

Remodeling

Foreman

# WORK REFERRAL LOS ANGELES COUNTY DISTRICT COUNCIL OF CARPENTERS

G. A. McCulloch  
SECY. TREAS.

INTRODUCING  
MR.

SOCIAL  
SECURITY NO.

NAME OF EMPLOYER

FOREMAN OR SPT.

JOB SITE ADDRESS

CITY

REMARKS

NOTE: THIS WORKMAN IS DISPATCHED AS SPECIFIED BY YOUR REQUEST. BY THE ACCEPTANCE OF THIS REFERRAL AND THE EMPLOYMENT OF THIS WORKMAN, YOU AGREE TO BE BOUND BY THE TERMS AND CONDITIONS OF THE "MASTER LABOR AGREEMENT", COVERING CARPENTERS AND ALLIED BUILDING CONSTRUCTION TRADES, AND AGREE TO PAY UNION WAGE RATES AND MAKE HEALTH AND WELFARE, PENSION, VACATION AND APPRENTICESHIP FUND CONTRIBUTIONS REQUIRED BY THE AGREEMENT. THE CURRENT SCALES AND RATES ARE:

WAGE SCALE  
HEALTH & WELFARE CONTRIBUTION 26¢ PER HR.  
PENSION BENEFIT CONTRIBUTION 20¢ PER HR.  
VACATION FUND CONTRIBUTION 15¢ PER HR.  
APPRENTICESHIP TRAINING CONTRIBUTION 14¢ PER HR.

BY AUTHORIZED REPRESENTATIVE LOCAL NO.

PHONE

ANY MEMBER ACCEPTING THIS REFERRAL AND NOT REPORTING TO THE JOBSITE MUST IMMEDIATELY NOTIFY THE OFFICE OF THIS LOCAL UNION.

REPORT TO STEWARD  
BEFORE GOING TO JOBSITE

REPORT TO STEWARD  
BEFORE GOING TO WORK

STEWARDS COPY

EXHIBIT 19, Work Referral Slip

BEST COPY AVAILABLE

TYPE OF HEARING  
CASE NO. 1866  
EXH. NO. 22  
ADMITTED IN EVIDENCE  
DATE 12-27-72  
WILLIAM G. SHARP, COUNTY CLERK  
DEPUTY

## CARPENTERS HEALTH & WELFARE TRUST FOR SOUTHERN CALIFORNIA ELIGIBILITY DEPARTMENT

Employee's Name Art Mascott SS# 019-16-3000

Eligibility Period  
Form CT-106

Month	Employer	Lic. #	Hours Claimed	Hours Reported
Jan-1967				112
FEB-1967				0
MAR-1967				0
APRIL-1967				0
MAY-1967				166
JUNE-1967				72
JULY-1967				0
AUG-1967				64
SEPT-1967				32
OCT-1967	Sanuelson Bros.	170446		30

## CARPENTERS HEALTH & WELFARE TRUST FOR SOUTHERN CALIFORNIA ELIGIBILITY DEPARTMENT

Employee's Name Art Mascott SS# 019-16-3000

Eligibility Period  
Form CT-106

Month	Employer	Lic. #	Hours Claimed	Hours Reported
NOV-1967	Sanuelson Bros	170446		32
DEC-1967				0
JAN-1968	Wm. Sanuelson Bros.	32005		32
JAN-1968	P. J. Walker	32876		48
FEB-1968	" "	"		2
MAR-1968	Russell Corp.	132524		123
APRIL-1968	" "	"		136
MAY-1968	" "	"		184
JUNE-1968	Paer Contra B.	161563		48
JULY 1968	" " "	"		56

EXHIBIT 20, Mascott Health & Welfare Record



**WORK REFERRAL**  
LOS ANGELES COUNTY  
DISTRICT COUNCIL OF CARPENTERS

G. A. MCCULLOCH  
SEC'Y., TREAS.

D 2118

DATE 5/1/68

INTRODUCING  
MR

SOCIAL  
SECURITY NO

NAME OF EMPLOYER

FOREMAN OR SUPT

JOB SITE ADDRESS

CITY

REMARKS

NOTE: THIS WORKMAN IS DISPATCHED AS SPECIFIED BY YOUR REQUEST BY THE ACCEPTANCE OF THIS REFERRAL AND THE EMPLOYMENT OF THIS WORKMAN YOU AGREE TO BE BOUND BY THE TERMS AND CONDITIONS OF THE MASTER LABOR AGREEMENT COVERING CARPENTERS AND ALLIED BUILDING CONSTRUCTION TRADES AND AGREE TO PAY UNION WAGE RATES AND MAKE HEALTH AND WELFARE, PENSION, VACATION AND APPRENTICESHIP FUND CONTRIBUTIONS REQUIRED BY THE AGREEMENT THE CURRENT SCALES AND RATES ARE

WAGE SCALE

HEALTH & WELFARE CONTRIBUTION

PER HR.

PENSION BENEFIT CONTRIBUTION

PER HR.

VACATION FUND CONTRIBUTION

PER HR.

APPRENTICESHIP TRAINING CONTRIBUTION

PER HR.

BY

AUTHORIZED REPRESENTATIVE

LOCAL NO.

PHONE

ANY MEMBER ACCEPTING THIS REFERRAL AND NOT REPORTING TO THE JOBSITE MUST IMMEDIATELY NOTIFY THE OFFICE OF THIS LOCAL UNION.

REPORT TO STEWARD  
BEFORE GOING TO WORK

UNION COPY

EXHIBIT 21, Work Referral Slip

**WORK REFERRAL**  
LOS ANGELES COUNTY  
DISTRICT COUNCIL OF CARPENTERS

G. A. MCCULLOCH  
SEC'Y., TREAS.

D 2173

DATE 5/13/68

INTRODUCING  
MR

SOCIAL  
SECURITY NO

NAME OF EMPLOYER

FOREMAN OR SUPT

JOB SITE ADDRESS

CITY

REMARKS

NOTE: THIS WORKMAN IS DISPATCHED AS SPECIFIED BY YOUR REQUEST BY THE ACCEPTANCE OF THIS REFERRAL AND THE EMPLOYMENT OF THIS WORKMAN YOU AGREE TO BE BOUND BY THE TERMS AND CONDITIONS OF THE MASTER LABOR AGREEMENT COVERING CARPENTERS AND ALLIED BUILDING CONSTRUCTION TRADES AND AGREE TO PAY UNION WAGE RATES AND MAKE HEALTH AND WELFARE, PENSION, VACATION AND APPRENTICESHIP FUND CONTRIBUTIONS REQUIRED BY THE AGREEMENT THE CURRENT SCALES AND RATES ARE

HEALTH & WELFARE CONTRIBUTION

PER HR.

PENSION BENEFIT CONTRIBUTION

PER HR.

VACATION FUND CONTRIBUTION

PER HR.

APPRENTICESHIP TRAINING CONTRIBUTION

PER HR.

BY

AUTHORIZED REPRESENTATIVE

LOCAL NO.

PHONE

ANY MEMBER ACCEPTING THIS REFERRAL AND NOT REPORTING TO THE JOBSITE MUST IMMEDIATELY NOTIFY THE OFFICE OF THIS LOCAL UNION.

REPORT TO STEWARD  
BEFORE GOING TO WORK

STEWARDS COPY

EXHIBIT 22, Work Referral Slip



# WORK REFERRAL

LOS ANGELES COUNTY  
DISTRICT COUNCIL OF CARPENTERS

G. A. MCCULLOCH  
SECY., TREAS.

0 2099

DATE 5-14-68

INTRODUCING  
MR

Richard Hill

SOCIAL  
SECURITY NO

NAME OF EMPLOYEE

MEMBERS  
LOCAL

25

FOREMAN OR SUPT

JOBSITE ADDRESS

CITY

REMARKS

2-days on Retainer Wall  
(refused) - initial what

HEALTH & WELFARE CONTRIBUTION  
PENSION BENEFIT CONTRIBUTION  
VACATION FUND CONTRIBUTION  
APPRENTICESHIP TRAINING CONTRIBUTION

PER HR.  
PER HR.  
PER HR.  
PER HR.

BY AUTHORIZED REPRESENTATIVE

LOCAL NO.

25

PHONE

ANY MEMBER ACCEPTING THIS REFERRAL AND NOT REPORTING TO THE  
JOBSITE MUST IMMEDIATELY NOTIFY THE OFFICE OF THIS LOCAL UNION.

REPORT TO STEWARD  
BEFORE GOING TO WORK

STEWARDS COPY

EXHIBIT 23, Work Referral Slip

TXD-(SF)-154-68

## NOTICE TO ALL MEMBERS AND APPLICANTS FOR EMPLOYMENT

PURSUANT TO

THE RECOMMENDED ORDER OF A TRIAL EXAMINER OF THE

NATIONAL LABOR RELATIONS BOARD

and in order to effectuate the policies of the

NATIONAL LABOR RELATIONS ACT  
(AS AMENDED)

we hereby notify you that:

A Trial Examiner of the National Labor Relations Board has found that we caused Dinwiddie-Simpson Construction Company to discriminate against Richard T. Hill in violation of the National Labor Relations Act, as amended, by failing to honor a request by that company for Hill's services because Hill was opposed to the methods of dispatching employed on May 1, 1967, and sought to influence others to oppose the business agents.

The Trial Examiner has also found that we have restrained and coerced employees in violation of the Act by threats of loss of work, by attempts to intimidate, and by attempt to cause expulsion of a member because he was critical of our dispatching methods or was working toward a change in business agents.

We therefore notify you that:

WE WILL NOT cause or attempt to cause Dinwiddie-Simpson, or any other employer, to discriminate against Richard T. Hill, or any other employee or applicant for employment, in regard to hire or tenure of employment in violation of Section 8(a)(3) of the Act.

WE WILL NOT restrain or coerce employees in the exercise of the right to engage in union activities or any concerted activities in a bona fide attempt to cause a change of any agent or representative of this labor organization.

WE WILL make Richard T. Hill whole for any loss he may have suffered as a result of the discrimination caused by us.

UNITED BROTHERHOOD OF CARPENTERS  
AND JOINERS OF AMERICA, AFL-CIO  
LOCAL NO. 25

(Labor Organization)

Dated

By

(Representative)

(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 10th Floor, Bartlett Building, 215 West Seventh Street, Los Angeles, California, 90014, Telephone Number 688-5850.

EXHIBIT 25, Copy of Notice

# LIST #1

For workmen who HAVE performed work of the type covered by the Master Labor Agreement in the geographic area of the Labor Agreement within the past five years.  
Los Angeles County District Council of Carpenters  
EMPLOYMENT LIST

DATE	No.	PLEASE PRINT NAME	LOCAL NO.	HOUSING		COMMERCIAL		CONCRETE	REMARKS
				ROUGH	FINISH	FRAMING	FINISH	FORMS	
		H. "Blue" Carlstrom	25						Join Your Local #25 Credit Union
		Joe Norwood	25						Join Your Local #25 Credit Union
		Quentin W. Juge	25						Join Your Local #25 Credit Union
		C.D. Farnsworth	25						Join Your Local #25 Credit Union
		Jose Coates	25						Join Your Local #25 Credit Union
		Alfred Blomberg	25						
		Leopoldo Hernandez	25					X	MON Kemp Bros 37th & Hoover
		Jose Cide Baca	25					X	MON 1435 W 3rd St
		Ray McClinton	25						
		Art L. Vallen	25	X				X	MON
		Mark Prosser	25					X	MON
		Walter Co. Gar	25			Class A		X	Snow Man
		Wm. J. Johnson	25					X	Call man
		Wm. C. Cook Jr	25						
		Harvey T. Linder	25						
		Michael Eisenmann	25					X	MON
		HENRY U. Shoen	25						
		Dennis P. Chell	25						Hold 20 was 1 man
		H H I I I I I I I I	25	X					
		Edgar Miller	25						

FORM 200-1011

EXHIBIT 26, 11 out of work lists of 5 to 10 pages each  
(first page of first list reproduced)

**LIST #1**

For workmen who HAVE performed work of the type covered by the Master Labor Agreement in the geographic area of the Labor Agreement within the past five years.

Los Angeles County District Council of Carpenters

**EMPLOYMENT LIST**

DATE	No.	PLEASE PRINT NAME	LOCAL NO.	HOUSING		COMMERCIAL		CONCRETE	REMARKS
				ROUGH	FINISH	FRAMING	FINISH	FORMS	
		John W. INGE	25	✓					TYPE OF HEARING <i>Just</i>
		G. C. Ortega	25					✓	CASE NO. 951866
		J. CORTES	25	✓					EXH. NO. 27
	25	Howard Wolff	25					X	ADMITTED IN EVIDENCE
		John EARLE	25	✓					DATE 12-27-72
		Walter Perryman	25	✓					WILLIAM G. SHARP, COUNTY CLERK
		BILL LARSON	25						BY <i>Thomas J. Smith</i>
		HOLE CARLSTROM	25	✓					Supt NIA 58515
		Charles Abram	25	✓					Sawman
		HUGH Williamson	25	X					
		VINCENT BEHRENS	769					X	
		<del>Hilbert J. J. J.</del> (SEE PAGE 6)	25					✓	
		Arthur Ellis	25					✓	
		DENNIS POWELL	25						NO WORK
		HENRY V. SLON	25						REL 7597
		M. CARMELIATE	25	✓					FORN 73N
		Carl Clark	25						Sawyer
		Daniel Fletcher	25	X		X		X	
		ERNEST F. HOFFMANN	25		Suitcase				Treman NO-1-6095
		FRANK Lewis	25	X					
		George Swaltke	25	X					

FORM 800-10M

EXHIBIT 27, Out of Work List  
(first of 8 pages)



LIST #1

For workers who HAVE performed work of the type covered by the Master Labor Agreement in the geographic area of the Labor Agreement within the past five years.  
Los Angeles County District Council of Carpenters

EMPLOYMENT LIST

2-17-69

PM 28

DATE	No.	PLEASE PRINT NAME	LOCAL NO.	HOUSING		COMMERCIAL		CONCRETE	REMARKS
				ROUGH	FINISH	FRAMING	FINISH	FORMS	
		BILL LARSON	25						Sept NIA 5-8515
		W. Dickinson	25						See man.
		M. CARMENATE	25	✓					
		William Fleming	25				X		TYPE OF HEARING <i>Real</i>
		DAN HERNANDES	25	1					CASE NO. 9151866
		Joe Howard	25					X	EXH. NO. 28
		Stephen Kravitz	25					X	ADMITTED IN EVIDENCE
		Joe Kravitz	25	X					DATE 12-27-68
		E. E. Duthrow	25					X	WILLIAM G. SHARP, COUNTY CLERK
		Richard Croner	25			X		X	BY: <i>[Signature]</i>
		Ed Jack Wolf	25					X	<i>[Signature]</i>
		W. OLEG CARLSTROM	25		X				See man
		Vito Jacmineli	25		X		X		
		JAMES MCINTOSH	25					X	
		George E. Wincent	25					X	
		Jeane A. Turner	25			X		X	
		Ralph Tokumoto	25			X	X	X	
		Herbert Turner	25					✓	
		Edward Kearns	25		X		X		
		Milton Steyer	25						Removal in
		Kenneth Black	25	X					Form

FORM 300-10M

EXHIBIT 28, Out of Work List  
(first of 13 pages)

W. P. S. C. 12  
"11/14/68"

LIST #1

For workmen who HAVE performed work of the type covered by the Master Labor Agreement in the geographic area of the Labor Agreement within the past five years.  
Los Angeles County District Council of Carpenters  
EMPLOYMENT LIST

X - 27 - 41

page 29

1 - 1

DATE	No.	PLEASE PRINT NAME	LOCAL NO.	HOUSING		COMMERCIAL		CONCRETE	REMARKS
				ROUGH	FINISH	FRAMING	FINISH	FORMS	
		Bill Larson ✓	25						Sept MA5-85-15
		HW Dickinson ✓	25	✓					TYPE OF HEARING 2nd
		M - CAR MEDIATE ✓	25	✓					CASE NO. 1118
		William Fleming ✓	25				X		EXH. NO. 29
		DAN HERNANDES ✓	25	X					ADMITTED IN EVIDENCE
		Joe Howard ✓	25					X	DATE 12-27-68
		<del>William Henderson</del> ✓	25					X	WILLIAM G. SHARP, COUNTY CLERK
		Edmund ✓	25	X					BY <del>William G. Sharp</del> <i>William G. Sharp</i>
		<del>Edmund</del> ✓	25					X	3-5-69 Walter K. H. H. H.
		Edmund ✓	25					X	3-5-69 Walter K. H. H. H.
		<del>Edmund</del> ✓	25			X		X	3-5-69 Walter K. H. H. H.
		W. O'LEE CARLSTRA ✓	25		X				Sawman
		Viktor Jacquinet ✓	25		X		X		
		JAMES McINTOSH ✓	25					X	
		George E. Vincent ✓	25					X	
		Eric A. Turner ✓	25			X		X	
		RALPH TEKOROTO ✓	25			X	X	X	
		Robert J. J. ✓	25					✓	
		Edward K. K. ✓	25		X		X		
		Malton L. L. ✓	25						Remodeling
		Kenneth Black ✓	25	X					Form 3

FORM 200-10M

EXHIBIT 29, Out of Work List  
(first of 13 pages)

Page 32

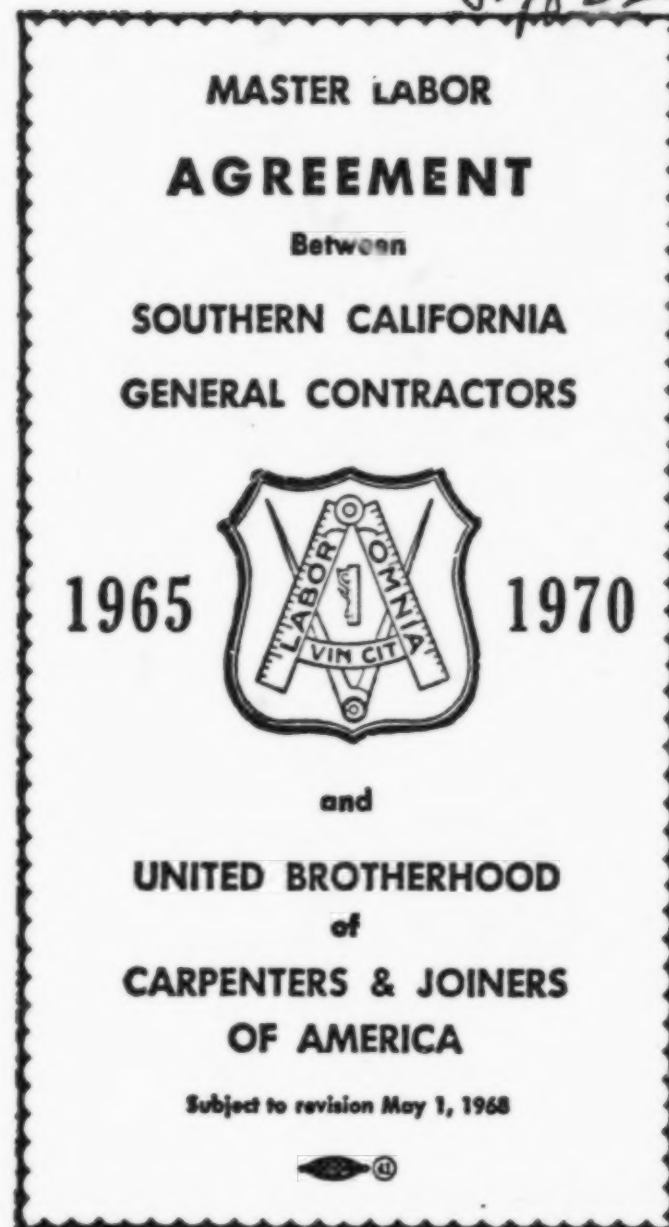


EXHIBIT 32, Master Contract  
(first 11 pages)

## MASTER LABOR AGREEMENT

Between

**SOUTHERN CALIFORNIA  
GENERAL CONTRACTORS**

and

**UNITED BROTHERHOOD OF  
CARPENTERS AND JOINERS  
OF AMERICA**

THIS AGREEMENT entered into this 1st day of May, 1962, as amended May 1, 1965, by and between the Southern California Chapter of The Associated General Contractors of America, The Engineering and Grading Contractors Association, Inc., The Home Builders Association of Los Angeles, Orange and Ventura Counties (hereinafter referred to as the Home Builders Association), each in behalf of its eligible members, the Building Contractors Association, Inc., in behalf of its signatory members, hereinafter referred to as the CONTRACTORS; and the United Brotherhood of Carpenters and Joiners of America, for its affiliated District Councils and Local Unions in Southern California, hereinafter referred to as the UNION.

The Contractors are engaged in construction work in Southern California and, in the performance of their present and future contracting operations are employing and will employ workmen under the terms of this Agreement. The Contractors want to be assured of their ability to procure workmen, for the work covered by this Agreement, in the area hereinafter defined in Article I, in sufficient number and with sufficient skill to assure continuity of work in the completion of their construction contracts. The



Union and the Contractors, by this Agreement, intend to establish uniform rates of pay, hours of employment and working conditions for the employees covered by this Agreement. The Union and the Contractors further intend by this Agreement to provide, establish and put into practice an effective method for the settlement of misunderstandings, disputes or grievances, with the thought in mind that the Contractors are assured continuity of operation and the employees of the Contractors are assured continuity of employment and industrial peace is maintained.

#### ARTICLE I Coverage

101. This Agreement shall apply to and cover all employees of the Contractors, within the territory as described in this paragraph, employed to perform or performing construction work within the jurisdiction of the Union, as such employees and construction work are respectively defined hereafter in this Article and Articles II and XI of this Agreement, in the area known as Southern California, and more particularly described as the counties of Los Angeles, Inyo, Mono, Orange, Riverside, San Bernardino, Imperial, Ventura, Santa Barbara, San Luis Obispo and Kern.

102. All work performed in the Contractors' warehouses, shops or yards which have been particularly provided or set up to handle work in connection with a job or project covered by the terms of this Agreement, and all of the production or fabrication of materials by the Contractor, or subcontractor, for use on the project shall be subject to the terms and conditions of this Agreement.

103. The Contractor agrees that he, or any of his subcontractors on the jobsite, will not contract

or subcontract work to be done at the site of construction, alteration, painting, or repair of a building, structure, or other work, except to a person, firm or corporation, party to an appropriate, current labor agreement with the appropriate union, or subordinate body, affiliated with the Building and Construction Trades Department, AFL-CIO, or with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or an affiliate thereof.

103.1 A subcontractor for the purposes of this Agreement, with the exception of the general provision immediately above, is defined as any person, firm or corporation that holds a valid State Contractors' License and that agrees under contract in writing with the Contractor or in writing with his subcontractors to perform any work covered by this Agreement, and who employs workmen as employees to perform services covered by this Agreement, including the performance of labor, and/or furnishing or installation of material, or the operation of equipment. All employees of subcontractors will perform work at the appropriate hourly rate and will be reported to such trust funds as required by the Agreement.

103.2 All work performed by the Contractors or subcontractors and all services rendered for the Contractors or subcontractors, as herein defined, shall be rendered in accordance with each and all of the terms and provisions hereof.

103.3 If the Contractor or subcontractors shall subcontract jobsite work covered under the jurisdiction of the United Brotherhood of Carpenters and Joiners of America, including the furnishing and installation of materials, performance of labor, and the operation of equipment, provision shall be made in written contract for the observance and compliance

by his subcontractors with the full terms of this Agreement.

103.4 The Contractor shall provide in his contract The subcontractor accepts and agrees to be bound by the Plan for Settling Jurisdictional Disputes Nationally and Locally, as the same now is, or hereafter may be amended, and to be bound by the decisions of the National Joint Board for the Settlement of Jurisdictional Disputes as constituted under said Plan. The subcontractor agrees that he will bind any of his subcontractors to said Plan in the same manner and to the same effect as hereinabove provided with respect to him.

103.5 In particular, the subcontractor agrees to be bound by the provision of the Plan which states: "Any decisions or interpretations by the Joint Board (or hearings panel) shall immediately be accepted and complied with by all parties signatory to this agreement."

103.6 The Trustees, through the administrative office of the appropriate Health and Welfare, Pension, Vacation and Apprenticeship Funds, shall advise each Association party to this Agreement and the Union of the current, delinquent accounts.

103.6.1 The tenth calendar day after such notice is sent by the administrative office, the General Contractor shall become financially responsible for all delinquent fringe-benefit payments that accrued on his job after the ten-calendar-day-notice period for payments owed by any subcontractor. The Contractor may terminate the subcontract of said delinquent subcontractor, or subcontractors, thereby limiting his liability, on that job, to the period from the eleventh day after notice is sent by the administrative office to the termination of such subcontract on that job.

103.6.2 Where a Contractor contracts with a list-

ed delinquent subcontractor, or subcontractors, the Contractor may terminate the subcontract of such delinquent subcontractor, or subcontractors, thereby limiting his liability, on that job, to the period from the commencement of the work under the subcontract to the date of termination of that subcontract.

103.6.3 The Union may give written notice to a listed delinquent Contractor, or subcontractor, (with a copy to the General Contractor) to pay the delinquent amounts due all trust funds. Within five days from the giving of such notice, the Union shall withhold service from any or all jobs of such delinquent Contractor, or subcontractor, if proper payment is not made.

103.6.4 Where the General Contractor fails or refuses to make any payments required under the above provisions, the Union shall have the right to withhold service from any or all jobs of such General Contractor.

103.6.5 Where there is no General Contractor on the jobsite, the right to withhold service by the Union shall apply to the project as a whole.

103.6.6 The provisions of this paragraph 103.6 shall be effective September 1, 1962, but shall not apply to any Contractor who has been audited prior to the effective date for the period covered by that audit.

103.6.7 Any such action in accordance with the foregoing shall not be considered a strike or work stoppage within the terms of this Agreement. This provision shall apply to any Contractor, or subcontractor, on any jobsite operation under any change of name or association or joint venture, including any person who may have been a principal, financially associated with the Contractor, or subcontractor, who was delinquent in said payments and with regard to which delinquency the notice required has been given.

104. The Contractors and their subcontractors shall have freedom of choice in the purchase of materials, except that every reasonable effort shall be made by Contractors and their subcontractors to refrain from the use of materials, which use will tend to cause any discord or disturbance on the project. Employees shall not be required to handle non-union material. The provisions of this Paragraph 104 shall be operative to the extent permitted by law, and should any final determination of the National Labor Relations Board or any court of competent jurisdiction affect the validity of such provisions, the parties shall meet within ten days of such final determination solely for the purpose of renegotiating the provisions of this Paragraph 104 to meet any objections to the validity of the provisions raised by such determination.

105. Repairs necessitated by defects of material or workmanship or adjustments of newly purchased and/or installed equipment or machinery will not be subject to this Agreement when such repairs and/or adjustments are made by the manufacturer thereof or his agents or employees pursuant to the terms of a manufacturer's guarantee and the Union will not hamper such manufacturer or his agents or employees on such exempted work.

106. Definitions.

106.1 The term *Contractor*, as used herein, shall refer to an employer party to this Agreement.

106.2 The term *Association*, as used herein, shall refer to the Southern California Chapter of The Associated General Contractors of America, The Engineering and Grading Contractors Association, Inc., The Home Builders Association (a certified roster of eligible members to be furnished to the Union without delay at the signing of this Agreement and upon acceptance of new members) and The Building Contractors Association, Inc. (a list of authori-

zations through power of attorney, certified by an authorized person, to be furnished to the Union without delay at the signing of this Agreement, for present members and upon acceptance of new members).

106.3 The term *Union*, as used herein, shall refer to the United Brotherhood of Carpenters and Joiners of America, for its affiliated District Councils and Local Unions in Southern California.

106.4 The term *Workmen*, as used herein, shall refer to a person, or persons, in the labor market who are not employed.

106.5 The term *Employee(s)*, as used herein, shall refer to the employed person, or persons.

## ARTICLE II

### Union Recognition

201. The Contractors hereby recognize the Union as the sole and exclusive collective bargaining representative of employees of the Contractors over whom the Union has jurisdiction. It is understood that the Union does not at this time, nor will it during the term of this Agreement, claim jurisdiction over the following classes of employees: executives, civil engineers and their helpers, superintendents, assistant superintendents, master mechanics, time keepers, messenger boys, office workers or any employees of the Contractor above the rank of craft foreman.

202. The Union hereby recognizes the Southern California Chapter of The Associated General Contractors of America, Building Contractors Association of California, Inc., Engineering & Grading Contractors Association, Inc., and The Home Builders Association as the sole and exclusive bargaining representatives for their respective members, present and future, who are or who become bound by this Agreement, and agrees that during the term of this



Agreement it will not negotiate or enter any Agreement with such individual members of the Associations relative to part or all of the subject matter covered by this Agreement.

203. This Agreement shall be binding upon each and every eligible member of the Southern California Chapter of The Associated General Contractors of America, The Home Builders Association and The Engineering and Grading Contractors Association, Inc. with the same force and effect as if this Agreement were entered into by each member individually; and this Agreement shall be binding upon each and every member of The Building Contractors Association, Inc., who becomes signatory hereto. All eligible members of the Southern California Chapter of The Associated General Contractors of America, The Engineering and Grading Contractors Association, Inc., The Home Builders Association and all signatory members of The Building Contractors Association, Inc. shall be and continue to remain jointly and severally liable under this Agreement for and during the term hereof, irrespective of whether said members shall resign from any of the respective associations prior to the expiration date of this Agreement, and such liability shall be deemed to have survived the termination of said membership and remain in force for and during the term of this Agreement; provided, however, that as to such former members the provisions of Article III and Article V shall not be applicable or in force from and after the time when a member resigns from any of the said associations. Such former members shall be bound by any renewals or extensions of this Agreement unless they give the appropriate Association(s) and the Union at least sixty days' written notice prior to May 1, 1970, or any subsequent year of their intent not to be bound by the new or renewed agreement. Contractor associations will at

vises the Union of new and resigned memberships within seven days after occurrence.

204. In the employment of workmen for all work covered by this Agreement in the territory above described, the following provisions subject to the conditions of paragraph 201 above shall govern:

204.1 The Local Unions shall establish and maintain open and non-discriminatory employment lists for the use of workmen desiring employment on work covered by this Agreement and such workmen shall be entitled to use such lists free of charge.

204.2 The Contractors shall first call upon the Local Union having work and area jurisdiction for such men as they may from time to time need, and the respective Local Union shall furnish to the Contractors the required number of qualified and competent workmen and skilled mechanics of the classifications needed by the Contractors strictly in accordance with the provisions of this Article.

204.3 It shall be the responsibility of the Contractors, when ordering men, to give the Local Union all of the pertinent information regarding the workman's employment.

204.4 The Local Union or District Council will dispatch in accordance with the request of the Contractor each such qualified and competent workman from among those entered on said lists in numerical order to the Contractor by the use of a written referral in the following order of preference and the selection of workmen for referral to jobs shall be on a non-discriminatory basis:

204.4.1 Workmen specifically requested by name who have been employed, laid off or terminated as Carpenters in the geographic area of the Local Union or District Council, as the case may be, within three years before such request by a requesting individual

employer now desiring to reemploy the same workmen, provided they are available for employment.

204.4.2 Workmen who, within the five years immediately before the Contractor's order for men, have performed work of the type covered by this Agreement in the geographic area of the Agreement, as defined in Paragraph 101, provided such workmen are available for employment.

204.4.3 It is agreed that in connection with the preference outlined in subparagraph 204.4.2 up to 25% of the employees, excluding foremen, employed to perform work covered by this Agreement on any project may be employees designated by the individual employer.

204.4.4 Workmen whose names are entered on said lists and who are available for employment.

205. When ordering workmen of the skills required, the Contractor will give notice to the Local Union not later than 2:30 P.M. of the day prior (Monday through Friday) or, in any event, no less than 17½ hours before the required reporting time and in the event that, 48 hours after such notice, the Local Union shall not furnish such employees, the Contractor may procure employees from any other source or sources. If men are so employed the Contractor shall immediately report to the Local Union having work and area jurisdiction each such employee by name.

206. Employees employed by one or more of the Contractors for a period of 8 days continuously or accumulatively shall be or become after the 8-day period, or 8 days after the effective date of the Agreement, whichever is later, members of the Union and shall remain members of the Union as condition of continued employment. Membership in the Union shall be available upon terms and qualifications not more burdensome than those applicable

at such times to other applicants for membership to the Union.

207. Subject to the foregoing, Contractors shall have complete freedom of selectivity in hiring and Contractors retain the right to reject any job applicant referred by the Union for any reason. Contractors may discharge any employee for any cause which they may deem sufficient, provided there shall be no discrimination on the part of the Contractors against any employee, or activities in behalf of, or representation of, the Union not interfering with the proper performance of his duties.

208. The Contractor may transfer employees who are on the Contractor's payroll at the time transfer is made within the area of a District Council, without limitation. Additional employees shall be employed in accordance with the provisions of Article II, Paragraph 204.4.

208.1 Employees employed by any Contractor pursuant to the terms of this Agreement, and remaining in good standing in the Union, shall not be removed nor transferred by the Union unless the prior approval of the Contractor has been obtained.

### ARTICLE III

#### Strikes—Lockouts—Jurisdictional Disputes

301. It is the purpose and intent of the parties hereto that all grievances or disputes arising between them over the interpretation or application of the terms of this Agreement shall be settled by the procedure set forth in Article V hereof, and that, during the term of this Agreement, the Union shall not call or engage in, sanction or assist in a strike against, or any slow-down, or stoppage of the work of, the Contractor. During the term of this Agreement, a Contractor shall not cause or permit any lockout of the employees covered under this Agreement.

302. If a Contractor is performing work on a proj-





**WORK REFERRAL**  
LOS ANGELES COUNTY  
DISTRICT COUNCIL OF CARPENTERS

G. A. McCulloch  
SECY. TREAS.

G 78052

INTRODUCING  
MR.

SOCIAL  
SECURITY NO.

MEMBERS  
LOCAL #

NAME OF EMPLOYER

FOREMAN OR SUPT.

JOB SITE ADDRESS

CITY

REMARKS

NOTE: THIS WORKMAN IS DISPATCHED AS SPECIFIED BY YOUR REQUEST. BY THE ACCEPTANCE OF THIS REFERRAL AND THE EMPLOYMENT OF THIS WORKMAN, YOU AGREE TO BE BOUND BY THE TERMS AND CONDITIONS OF THE "MASTER LABOR AGREEMENT", COVERING CARPENTERS AND ALLIED BUILDING CONSTRUCTION TRADES, AND AGREE TO PAY UNION WAGE RATES AND MAKE HEALTH AND WELFARE, PENSION, VACATION AND APPRENTICESHIP FUND CONTRIBUTIONS REQUIRED BY THE AGREEMENT. THE CURRENT SCALES AND RATES ARE:

	WAGE SCALE	
HEALTH & WELFARE CONTRIBUTION	25¢ PER HR.	
PENSION BENEFIT CONTRIBUTION	30¢ PER HR.	
VACATION FUND CONTRIBUTION	15¢ PER HR.	
APPRENTICESHIP TRAINING CONTRIBUTION	14¢ PER HR.	
BY <u>[Signature]</u>	LOCAL NO. <u>21</u>	
AUTHORIZED REPRESENTATIVE		
PHONE		

ANY MEMBER ACCEPTING THIS REFERRAL AND NOT REPORTING TO THE JOBSITE MUST IMMEDIATELY NOTIFY THE OFFICE OF THIS LOCAL UNION.

**REPORT TO STEWARD  
BEFORE GOING TO WORK**

STEWARDS COPY

**WORK REFERRAL**  
LOS ANGELES COUNTY  
DISTRICT COUNCIL OF CARPENTERS

G. A. McCulloch  
SECY. TREAS.

G 78052

INTRODUCING  
MR.

SOCIAL  
SECURITY NO.

MEMBERS  
LOCAL #

NAME OF EMPLOYER

FOREMAN OR SUPT.

JOB SITE ADDRESS

CITY

REMARKS

NOTE: THIS WORKMAN IS DISPATCHED AS SPECIFIED BY YOUR REQUEST. BY THE ACCEPTANCE OF THIS REFERRAL AND THE EMPLOYMENT OF THIS WORKMAN, YOU AGREE TO BE BOUND BY THE TERMS AND CONDITIONS OF THE "MASTER LABOR AGREEMENT", COVERING CARPENTERS AND ALLIED BUILDING CONSTRUCTION TRADES, AND AGREE TO PAY UNION WAGE RATES AND MAKE HEALTH AND WELFARE, PENSION, VACATION AND APPRENTICESHIP FUND CONTRIBUTIONS REQUIRED BY THE AGREEMENT. THE CURRENT SCALES AND RATES ARE:

	WAGE SCALE	
HEALTH & WELFARE CONTRIBUTION	25¢ PER HR.	
PENSION BENEFIT CONTRIBUTION	30¢ PER HR.	
VACATION FUND CONTRIBUTION	15¢ PER HR.	
APPRENTICESHIP TRAINING CONTRIBUTION	14¢ PER HR.	
BY <u>[Signature]</u>	LOCAL NO. <u>21</u>	
AUTHORIZED REPRESENTATIVE		
PHONE		

ANY MEMBER ACCEPTING THIS REFERRAL AND NOT REPORTING TO THE JOBSITE MUST IMMEDIATELY NOTIFY THE OFFICE OF THIS LOCAL UNION.

**REPORT TO STEWARD  
BEFORE GOING TO WORK**

UNION COPY

**BEST COPY AVAILABLE**

**WORK REFERRAL**  
LOS ANGELES COUNTY  
DISTRICT COUNCIL OF CARPENTERS

G. A. MCCULLOCH  
SEC'Y., TREAS.

**D-2115**

DATE 5/1/68

INTRODUCING  
MR Frank Harris

SOCIAL  
SECURITY NO. \_\_\_\_\_

MEMBERS  
LOCAL # 25

NAME OF EMPLOYER W. Burke

FOREMAN OR SUPT. \_\_\_\_\_

JOB SITE ADDRESS 1030 Alpine St

CITY \_\_\_\_\_

REMARKS \_\_\_\_\_

NOTE: THIS WORKMAN IS DISPATCHED AS SPECIFIED BY YOUR REQUEST BY THE ACCEPTANCE OF THIS REFERRAL AND THE EMPLOYMENT OF THIS WORKMAN YOU AGREE TO BE BOUND BY THE TERMS AND CONDITIONS OF THE MASTER LABOR AGREEMENT, COVERING CARPENTERS AND ALLIED BUILDING CONSTRUCTION TRADES, AND AGREE TO PAY UNION WAGE RATES AND MAKE HEALTH AND WELFARE, PENSION, VACATION AND APPRENTICESHIP FUND CONTRIBUTIONS REQUIRED BY THE AGREEMENT. THE CURRENT SCALES AND RATES ARE

WAGE SCALE 5.09  
HEALTH & WELFARE CONTRIBUTION \_\_\_\_\_  
PENSION BENEFIT CONTRIBUTION \_\_\_\_\_  
VACATION FUND CONTRIBUTION \_\_\_\_\_  
APPRENTICESHIP TRAINING CONTRIBUTION \_\_\_\_\_

PER HR.  
PER HR.  
PER HR.  
PER HR.

BY [Signature]  
AUTHORIZED REPRESENTATIVE

LOCAL NO. 25

PHONE \_\_\_\_\_

ANY MEMBER ACCEPTING THIS REFERRAL AND NOT REPORTING TO THE JOBSITE MUST IMMEDIATELY NOTIFY THE OFFICE OF THIS LOCAL UNION.

REPORT TO STEWARD  
BEFORE GOING TO WORK

UNION COPY

EXHIBIT 35, Work Referral Slip

**WORK REFERRAL**  
LOS ANGELES COUNTY  
DISTRICT COUNCIL OF CARPENTERS

G. A. MCCULLOCH  
SEC'Y., TREAS.

**D-2130**

DATE 5/3/68

INTRODUCING  
MR Frank Harris

SOCIAL  
SECURITY NO. \_\_\_\_\_

MEMBERS  
LOCAL # 25

NAME OF EMPLOYER Joe Geng

FOREMAN OR SUPT. \_\_\_\_\_

JOB SITE ADDRESS 262 Lafayette St

CITY \_\_\_\_\_

REMARKS \_\_\_\_\_

NOTE: THIS WORKMAN IS DISPATCHED AS SPECIFIED BY YOUR REQUEST BY THE ACCEPTANCE OF THIS REFERRAL AND THE EMPLOYMENT OF THIS WORKMAN YOU AGREE TO BE BOUND BY THE TERMS AND CONDITIONS OF THE MASTER LABOR AGREEMENT, COVERING CARPENTERS AND ALLIED BUILDING CONSTRUCTION TRADES, AND AGREE TO PAY UNION WAGE RATES AND MAKE HEALTH AND WELFARE, PENSION, VACATION AND APPRENTICESHIP FUND CONTRIBUTIONS REQUIRED BY THE AGREEMENT. THE CURRENT SCALES AND RATES ARE

WAGE SCALE 5.09  
HEALTH & WELFARE CONTRIBUTION \_\_\_\_\_  
PENSION BENEFIT CONTRIBUTION \_\_\_\_\_  
VACATION FUND CONTRIBUTION \_\_\_\_\_  
APPRENTICESHIP TRAINING CONTRIBUTION \_\_\_\_\_

PER HR.  
PER HR.  
PER HR.  
PER HR.

BY [Signature]  
AUTHORIZED REPRESENTATIVE

LOCAL NO. 25

PHONE \_\_\_\_\_

ANY MEMBER ACCEPTING THIS REFERRAL AND NOT REPORTING TO THE JOBSITE MUST IMMEDIATELY NOTIFY THE OFFICE OF THIS LOCAL UNION.

REPORT TO STEWARD  
BEFORE GOING TO WORK

UNION COPY

EXHIBIT 36, Work Referral Slip

# WORK REFERRAL

LOS ANGELES COUNTY  
DISTRICT COUNCIL OF CARPENTERS

G. A. MCCULLOCH  
SEC'Y., TREAS.

D 2111

INTRODUCING  
MR

*Eric E. Tardicelli*

SOCIAL  
SECURITY NO

MEMBERS  
LOCAL #

*55*

NAME OF EMPLOYER

FOREMAN OR SUPT

JOB SITE ADDRESS

CITY

REMARKS

*Ref by Ph*

NOTE: THIS WORKMAN IS DISPATCHED AS SPECIFIED BY YOUR REQUEST BY THE ACCEPTANCE OF THIS REFERRAL AND THE EMPLOYMENT OF THIS WORKMAN YOU AGREE TO BE BOUND BY THE TERMS AND CONDITIONS OF THE MASTER LABOR AGREEMENT, COVERING CARPENTERS AND ALLIED BUILDING CONSTRUCTION TRADES AND AGREE TO PAY UNION WAGE RATES AND MAKE HEALTH AND WELFARE, PENSION, VACATION AND APPRENTICESHIP FUND CONTRIBUTIONS REQUIRED BY THE AGREEMENT THE CURRENT SCALES AND RATES ARE

WAGE SCALE

*5.00*

HEALTH & WELFARE CONTRIBUTION

PENSION BENEFIT CONTRIBUTION

VACATION FUND CONTRIBUTION

APPRENTICESHIP TRAINING CONTRIBUTION

BY

AUTHORIZED REPRESENTATIVE

LOCAL NO.

PHONE

ANY MEMBER ACCEPTING THIS REFERRAL AND NOT REPORTING TO THE JOBSITE MUST IMMEDIATELY NOTIFY THE OFFICE OF THIS LOCAL UNION.

REPORT TO STEWARD  
BEFORE GOING TO WORK

UNION COPY

EXHIBIT 37, Work Referral Slip

# WORK REFERRAL

LOS ANGELES COUNTY  
DISTRICT COUNCIL OF CARPENTERS

G. A. MCCULLOCH  
SEC'Y., TREAS.

D 2185

DATE

*5/14/68*

INTRODUCING  
MR

*Andrew Bessel*

SOCIAL  
SECURITY NO

MEMBERS  
LOCAL #

NAME OF EMPLOYER

FOREMAN OR SUPT

JOB SITE ADDRESS

CITY

REMARKS

NOTE: THIS WORKMAN IS DISPATCHED AS SPECIFIED BY YOUR REQUEST BY THE ACCEPTANCE OF THIS REFERRAL AND THE EMPLOYMENT OF THIS WORKMAN YOU AGREE TO BE BOUND BY THE TERMS AND CONDITIONS OF THE MASTER LABOR AGREEMENT, COVERING CARPENTERS AND ALLIED BUILDING CONSTRUCTION TRADES AND AGREE TO PAY UNION WAGE RATES AND MAKE HEALTH AND WELFARE, PENSION, VACATION AND APPRENTICESHIP FUND CONTRIBUTIONS REQUIRED BY THE AGREEMENT THE CURRENT SCALES AND RATES ARE

WAGE SCALE

*5.00*

HEALTH & WELFARE CONTRIBUTION

PER HR.

PENSION BENEFIT CONTRIBUTION

PER HR.

VACATION FUND CONTRIBUTION

PER HR.

APPRENTICESHIP TRAINING CONTRIBUTION

PER HR.

BY

AUTHORIZED REPRESENTATIVE

LOCAL NO.

PHONE

ANY MEMBER ACCEPTING THIS REFERRAL AND NOT REPORTING TO THE JOBSITE MUST IMMEDIATELY NOTIFY THE OFFICE OF THIS LOCAL UNION.

REPORT TO STEWARD  
BEFORE GOING TO WORK

UNION COPY

EXHIBIT 41, Work Referral Slip



# WORK REFERRAL

LOS ANGELES COUNTY  
DISTRICT COUNCIL OF CARPENTERS

G. A. McCulloch  
SEC'Y., TREAS.

D 1237

DATE

5/23/68

INTRODUCING  
MR.

SOCIAL  
SECURITY NO.

NAME OF EMPLOYER

FOREMAN OR SUP.

JOB SITE ADDRESS

CITY

REMARKS

NOTE: THIS WORKMAN IS DISPATCHED AS SPECIFIED BY YOUR REQUEST BY THE ACCEPTANCE OF THIS REFERRAL AND THE EMPLOYMENT OF THIS WORKMAN YOU AGREE TO BE BOUND BY THE TERMS AND CONDITIONS OF THE MASTER LABOR AGREEMENT COVERING CARPENTERS AND ALLIED BUILDING CONSTRUCTION TRADES AND AGREE TO PAY UNION WAGE RATES AND MAKE HEALTH AND WELFARE PENSION VACATION AND APPRENTICESHIP FUND CONTRIBUTIONS REQUIRED BY THE AGREEMENT. THE CURRENT SCALES AND RATES ARE

WAGE SCALE 509  
HEALTH & WELFARE CONTRIBUTION PER HR.  
PENSION BENEFIT CONTRIBUTION PER HR.  
VACATION FUND CONTRIBUTION PER HR.  
APPRENTICESHIP TRAINING CONTRIBUTION PER HR.

BY AUTHORIZED REPRESENTATIVE LOCAL NO. 25

PHONE

ANY MEMBER ACCEPTING THIS REFERRAL AND NOT REPORTING TO THE JOBSITE MUST IMMEDIATELY NOTIFY THE OFFICE OF THIS LOCAL UNION.

REPORT TO STEWARD  
BEFORE GOING TO WORK

UNION COPY

EXHIBIT 42, Work Referral Slip

WHITE SLIPS

MARCH, 1968

1	#XXXXX 3-4-68	54	P. J. Walker 3 Form
2	3-5-68		P. J. Walker
3	3-4-68	90	Bomora Framing request 2 - Framing
4	36-68	24	Waliyea request 1 Steel Pans
5	3-5-68	Ed	Pozzo Constr. request 2 Tilt-up Form
6	3-4-68		Tom E. Rooney request 1 Tues, 2 Wed - Seats in gym.
7	3-5-68	Ed	Morley Constr. requests 2 Rough floor Backs
8	3-4-68	Ed	Roach Indus. Co. request 1 Tilt up Columns.
9	3-7-68	Ed	Ruane Corp requests 3 Form High
10	3-7-68	Ed	Bomora Framing 2 Apt. Framing
11	3-13-68	Ed	Tide Bay 3 Forms around machinery
12	3-18-68		John E. Meskell 1 Panel Finish
13	3-18-68	Ed	W. J. Burke 4 Forms
14	3-18-68	Ed	Sette and Noonan 2 Framing Apts.
15		q	Sette Noonan 3
16	3-19-68	Ed	Driver Eddy 1 Fire
17	3-19-68	Ed	James J. Barrett 1 Forms
18	3-19-68	Ed	Sette and Noonan 6 Framing Beamsides
19	3-19-68	Ed	Paul W. Speer Inc. 1 Forms
20	3-19-68	Ed	Wm. Simpson 3
21	3-18-68	Ed	Steed Bros. 1 Steward
22	3-18-68	Ed	Neils Pallisgaarg 1 appr. for Comm. Framing
23	3-25-68	Ed	Simpson Co. 5 for Bunker-Hill-Project Forms
24	3-22-68	Ed	Sheldon Pollock 2 Heavy Framing
25	3-22-68	Ed	Paul Speer 1 Form
26	3-21-68	Ed	Vern Huck 1 Rough and Finish
27	3-20-68	Ed	John Meskell 1 Form
28	3-21-68	Ed	Mead and Odonell 2 Comm. Framing
29	3-20-68	Ed	Vern R. Huck 1 finish, 1 rough
30	3-20-68	Ed	Paul W. Speer 1 Form
31	3-25-68		Meskell Co. 1 Finish Work
32	3-25-68	Ed	Oslo Const. Co. 1 Framing Comm.

TYPE OF HEARING 951866  
CASE NO. 46  
EXH. NO. 46  
ADMITTED IN EVIDENCE  
DATE 12/3/1973  
WILLIAM G. SHARP, COUNTY CLERK  
BY [Signature] DEPUTY

EXHIBIT 46, List of White Slips  
(first of 5 pages)

MAY, 1968

1	5-23-68	JW C. J. CeCinco requests 4 Forms
2	5-23-68	JW. Wm. Simpson requests 2 Canopy etc.
3	5-24-68	EF Kemp Bros. requests 2 Form Class A.
4	5-27-68	EGD Vinnell requests 1 Tilt up
5	5-27-68	JW Weymouth Crowell requests 1 Concrete Forms
6	5-27-68	EGD Pilot Woodworking Co. 1 Form
7	5-27-68	B. L. Hydraulic Hoist requests 5 Forms
8	5-28-68	JW Pacal Co. requests 1 Form etc.
9	5-27-68	EGD Wal-Yea requests 2
10	7-29-68	JW Vinnell Constr. Co. requests 6 Forms
11	5-29-68	JW Nsona Co. requests 1 Remodeling etc.
12	5-27-68	Kemp Bros requests 2 form
13	5-28-68	EGD Western Inland requests - Job Clear
14	5-13-68	BF P. J. Walker requests 2 Stripping
15	5-15-68	1 J. Walker requests 2 Pylaster Columns etc
16	5-15-68	George F. Cassey requests 1 Welder
17	5-16-68	EGD A. J. Pacal requests 1
18	5-16-68	JW John Meskell requests 1 Concrete Forms and Scaff.
19	5-15-68	EF Kemp Bros requests 3 Forms
20	5-15-68	EF. Eichleay Corp. requests 1 Form
21	5-16-68	JW Ruane Corp requests 2 Forms.
22	5-16-68	JW Joe Gerig requests 5 Framing Afts.
23	5-17-68	JW W. C. Crowell requests 2 Concrete Forms
24	5-20-68	Reeves Constr. requests 1 Framing Conn.
25	5-20-68	BF W. J. Barrett requests 2 Forms
26	5-20-68	BF W. C. Crowell requests 2 Forms
27	5-20-68	BF Wal-Yea requests 2 Pans
28	5-20-68	BF Vinnell Corp requests 2 Tilt up
29	5-21-68	Swinerton and Walberg requests 2 Remod. and Backing Form etc.
30		
31	5-21-68	JW Wal-Yea requests 2 Forms
32	5-21-68	EF Pl J. Walker requests 2 Column Forms

TYPE OF HEARING  
CASE NO. 951866  
EXH. NO. 47  
ADMITTED IN EVIDENCE  
DATE JUN 3 - 1968  
BY WILLIAM G. SHARP, COUNTY CLERK  
T. C. Chappell, DEPUTY

EXHIBIT 47, List of White Slips  
(first of 5 pages)

**WORK REFERRAL**  
LOS ANGELES COUNTY  
DISTRICT COUNCIL OF CARPENTERS  
G. A. MCCULLOCH  
SEC'Y. TREAS.

**A 10665**  
DATE 5/5/68

INTRODUCED BY Led Roth  
MR. 15

SOCIAL SECURITY NO. 1  
NAME OF EMPLOYER Nichols  
FOREMAN OR SUPT. Robert H. Bly  
JOBSITE ADDRESS \_\_\_\_\_  
CITY \_\_\_\_\_  
REMARKS \_\_\_\_\_

NOTE: THIS WORKMAN IS DISPATCHED AS SPECIFIED BY YOUR REQUEST. BY THE ACCEPTANCE OF THIS REFERRAL AND THE EMPLOYMENT OF THIS WORKMAN, YOU AGREE TO BE BOUND BY THE TERMS AND CONDITIONS OF THE "MASTER LABOR AGREEMENT", COVERING CARPENTERS AND ALLIED BUILDING CONSTRUCTION TRADES, AND AGREE TO PAY UNION WAGE RATES AND MAKE HEALTH AND WELFARE, PENSION, VACATION AND APPRENTICESHIP FUND CONTRIBUTIONS REQUIRED BY THE AGREEMENT. THE CURRENT SCALES AND RATES ARE:

WAGE SCALE	509
HEALTH & WELFARE CONTRIBUTION	26¢ PER HR.
PENSION BENEFIT CONTRIBUTION	30¢ PER HR.
VACATION FUND CONTRIBUTION	15¢ PER HR.
APPRENTICESHIP TRAINING CONTRIBUTION	1/4¢ PER HR.

BY A. H. H. H. LOCAL NO. 55  
AUTHORIZED REPRESENTATIVE  
PHONE \_\_\_\_\_

ANY MEMBER ACCEPTING THIS REFERRAL AND NOT REPORTING TO THE JOBSITE MUST IMMEDIATELY NOTIFY THE OFFICE OF THIS LOCAL UNION.

REPORT TO STEWARD  
UNION COPY

EXHIBIT 49, Work Referral Slips  
(first of 23)

86N

# **WORK REFERRAL** LOS ANGELES COUNTY DISTRICT COUNCIL OF CARPENTERS

G. A. MC CULLOCH  
SEC'Y., TREAS.

A 11224

DATE 4/22/68

INTRODUCING MR. John Smith

SOCIAL SECURITY NO. \_\_\_\_\_ MEMBERS LOCAL # 25

NAME OF EMPLOYER \_\_\_\_\_

FOREMAN OR SUPT. \_\_\_\_\_

JOB SITE ADDRESS Progressive Transportation  
13504 W 6th ST

CITY \_\_\_\_\_

REMARKS \_\_\_\_\_

NOTE: THIS WORKMAN IS DISPATCHED AS SPECIFIED BY YOUR REQUEST. BY THE ACCEPTANCE OF THIS REFERRAL AND THE EMPLOYMENT OF THIS WORKMAN, YOU AGREE TO BE BOUND BY THE TERMS AND CONDITIONS OF THE "MASTER LABOR AGREEMENT", COVERING CARPENTERS AND ALLIED BUILDING CONSTRUCTION TRADES, AND AGREE TO PAY UNION WAGE RATES AND MAKE HEALTH AND WELFARE, PENSION, VACATION AND APPRENTICESHIP FUND CONTRIBUTIONS REQUIRED BY THE AGREEMENT. THE CURRENT SCALES AND RATES ARE:

WAGE SCALE	
HEALTH & WELFARE CONTRIBUTION	26¢ PER HR.
PENSION BENEFIT CONTRIBUTION	30¢ PER HR.
VACATION FUND CONTRIBUTION	15¢ PER HR.
APPRENTICESHIP TRAINING CONTRIBUTION	1/4¢ PER HR.

BY E. H. Hally AUTHORIZED REPRESENTATIVE LOCAL NO. 25

PHONE \_\_\_\_\_

ANY MEMBER ACCEPTING THIS REFERRAL AND NOT REPORTING TO THE JOBSITE MUST IMMEDIATELY NOTIFY THE OFFICE OF THIS LOCAL UNION.

**REPORT TO STEWARD  
BEFORE GOING TO WORK**

EXHIBIT 52, Work Referral Slips  
(first of 2 reproduced) and out  
of work list (8 pages, not  
reproduced)

UNION COPY

# **WORK REFERRAL** LOS ANGELES COUNTY DISTRICT COUNCIL OF CARPENTERS

G. A. MC CULLOCH  
SEC'Y., TREAS.

A 10357

DATE 1-29-68

INTRODUCING MR. Robin Stivala

SOCIAL SECURITY NO. \_\_\_\_\_ MEMBERS LOCAL # 35

NAME OF EMPLOYER \_\_\_\_\_

FOREMAN OR SUPT. \_\_\_\_\_

JOB SITE ADDRESS Wilshire of Wilshire Pl.

CITY \_\_\_\_\_

REMARKS \_\_\_\_\_

NOTE: THIS WORKMAN IS DISPATCHED AS SPECIFIED BY YOUR REQUEST. BY THE ACCEPTANCE OF THIS REFERRAL AND THE EMPLOYMENT OF THIS WORKMAN, YOU AGREE TO BE BOUND BY THE TERMS AND CONDITIONS OF THE "MASTER LABOR AGREEMENT", COVERING CARPENTERS AND ALLIED BUILDING CONSTRUCTION TRADES, AND AGREE TO PAY UNION WAGE RATES AND MAKE HEALTH AND WELFARE, PENSION, VACATION AND APPRENTICESHIP FUND CONTRIBUTIONS REQUIRED BY THE AGREEMENT. THE CURRENT SCALES AND RATES ARE:

WAGE SCALE	
HEALTH & WELFARE CONTRIBUTION	26¢ PER HR.
PENSION BENEFIT CONTRIBUTION	30¢ PER HR.
VACATION FUND CONTRIBUTION	15¢ PER HR.
APPRENTICESHIP TRAINING CONTRIBUTION	1/4¢ PER HR.

BY [Signature] AUTHORIZED REPRESENTATIVE LOCAL NO. 35

PHONE \_\_\_\_\_

ANY MEMBER ACCEPTING THIS REFERRAL AND NOT REPORTING TO THE JOBSITE MUST IMMEDIATELY NOTIFY THE OFFICE OF THIS LOCAL UNION.

**REPORT TO STEWARD  
BEFORE GOING TO WORK**

EXHIBIT 53, Employee Request and  
Work Referral Slips  
(first of 2 pages)

UNION COPY



CARPENTERS HEALTH & WELFARE TRUST FOR SOUTHERN CALIFORNIA  
ELIGIBILITY DEPARTMENT

Employee's Name Art Rosales SS# 502-42-56-1

Eligibility Period 6/67  
Form#CT-106

Month	Employer	Dis.	Hours Claimed	Hours Reported
1-67				144
2-67				151
3-67				189
4-67				134
5-67				188
6-67				157
7-67				147
8-67				216
9-67				163
10-67	Samuelson Bros.	170446		152

EXHIBIT 54, Rosales Health & Welfare Record

TYPE OF HEARING 305  
CASE NO. 95-1866  
EXH. NO. 54  
ADMITTED IN EVIDENCE  
DATE 1/14/73  
BY William G. Sharp COUNTY CLERK  
Deputy

10 work referrals  
from Orange Records.

9 indicated: "Res"  
1 not indicated.

TYPE OF HEARING  
CASE NO. 95-1866  
EXH. NO. 55  
ADMITTED IN EVIDENCE  
DATE JAN 8 - 1973  
BY William G. Sharp COUNTY CLERK  
Deputy

EXHIBIT 55, 10 Work Referral Slips With  
Covering Sheet (covering sheet reproduced)

CARPENTERS LOCAL No. 25

Date 2-6-67

Firm Dept of water & power

Address 111 N. 2nd St. Los Angeles

By Jim Rodriguez

Type of Work 2nd

No. of Men 473

Report To Jim Rodriguez

4/22 - James Ferrer  
Austin Solis  
George Solis

IF AVAILABLE

By [Signature]  
Business Representative

EXHIBIT 56, White Slip

BEST COPY AVAILABLE

CARPENTERS HEALTH & WELFARE TRUST FOR SOUTHERN CALIFORNIA  
ELIGIBILITY DEPARTMENT

Employee's Name Mario Chavez SS# 524-8-4214

Eligibility Period                       
Form CT-106

month	Employer	Lic. #	Hours Claimed	Hours Reported
1-67				77
2-67				152
3-67				0
4-67				104
5-67				144
6-67				173
7-67				0
8-67				0
9-67				18

EXHIBIT 57, Chavez Health & Welfare Record

TYPE OF HEARING 951866  
CASE NO. 57  
EXH. NO. 57  
ADMITTED IN EVIDENCE  
DATE 10-18-1973  
WILLIAM G. SHARP, COUNTY CLERK  
BY [Signature] DEPUTY

# WORK REFERRAL

LOS ANGELES COUNTY

DISTRICT COUNCIL OF CARPENTERS

G. A. MC CULLOCH  
SECY., TREAS.

B 8325

INTRODUCING  
MR.

SOCIAL  
SECURITY NO.

NAME OF EMPLOYER

FOREMAN OR SUPT.

JOB SITE ADDRESS

CITY

REMARKS

NOTE: THIS WORKMAN IS DISPATCHED AS SPECIFIED BY YOUR REQUEST. BY THE ACCEPTANCE OF THIS REFERRAL AND THE EMPLOYMENT OF THIS WORKMAN, YOU AGREE TO BE BOUND BY THE TERMS AND CONDITIONS OF THE "MASTER LABOR AGREEMENT", COVERING CARPENTERS AND ALLIED BUILDING CONSTRUCTION TRADES, AND AGREE TO PAY UNION WAGE RATES AND MAKE HEALTH AND WELFARE, PENSION, VACA... AND APPRENTICESHIP FUND CONTRIBUTIONS REQUIRED BY THE AGREEMENT. THE CURRENT SCALES AND RATES ARE:

WAGE SCALE 397  
HEALTH & WELFARE CONTRIBUTION 26¢ PER HR.  
PENSION BENEFIT CONTRIBUTION 30¢ PER HR.  
VACATION FUND CONTRIBUTION 15¢ PER HR.  
APPRENTICESHIP TRAINING CONTRIBUTION 1/4¢ PER HR.

BY AUTHORIZED REPRESENTATIVE LOCAL NO. 25

ANY MEMBER ACCEPTING THIS REFERRAL AND NOT REPORTING TO THE JOBSITE MUST IMMEDIATELY NOTIFY THE OFFICE OF THIS LOCAL UNION.

REPORT TO STEWARD  
BEFORE GOING TO WORK

UNION COPY

EXHIBIT 58, Employee Request and  
Work Referral Slips (first of 5 pages)

## LIST #1

For workmen who HAVE performed work of the type covered by the Master Labor Agreement in the geographic area of the Labor Agreement within the past five years.

Los Angeles County District Council of Carpenters

### EMPLOYMENT LIST

EMPLOYMENT LIST										
DATE	No.	PLEASE PRINT NAME	LOCAL NO.	HOUSING		COMMERCIAL		CONCRETE		REMARKS
				ROUGH	FINISH	FRAMING	FINISH	FORMS		
		Walter Perryman ✓	25							
		Robert Baxter ✓	25							
		Earl Hatfield ✓	25							
		HOWARD O FOSTER ✓	25							
		"Olee" Carlstrom ✓	25							Lawman
		Victor Stromquist ✓	25							
		Mike Thompson ✓	25							
		Bill C. Ferrone ✓	25							
		Robert Lifford ✓	25	X	X	X	X			
		Archie Mednick ✓	25				X			
		William Fleming ✓	25				X			
		Er. N. Wallace ✓	25							
		Alphonse HRYMPL ✓	25	X	X	X	X	X		
		W. H. G. G. G. ✓	25					X		
		W. H. G. G. G. ✓	25							
		H. WEAVER ✓	25							
		James Walker ✓	25							Transit Layout
		Oliver Scruggs ✓	25					X		
		ZANIGRILLI ✓	25				X			
		S. Mednick ✓	25							
		Herschel Yeakley ✓	25							Foreman

FORM 300-10M

EXHIBIT 59, Out of Work List and Work Referral Slips  
(first of 27 pages of list reproduced)



WORK REFERRAL  
LOS ANGELES COUNTY  
DISTRICT COUNCIL OF CARPENTERS

G. A. MCCULLOCH  
SEC'Y., TREAS.

D 1203

DATE

6/4/68

INTRODUCING  
MR

Ed Borge

SOCIAL  
SECURITY NO

MEMBERS  
LOCAL #

25

NAME OF EMPLOYER

Austin Co

FOREMAN OR SUPT

1900 W. Slanson

JOB SITE ADDRESS

CITY

Reg

REMARKS

Mr Anthony DeRosa

NOTE THIS WORKMAN IS DISPATCHED AS SPECIFIED BY YOUR REQUEST BY THE ACCEPTANCE OF THIS REFERRAL AND THE EMPLOYMENT OF THIS WORKMAN YOU AGREE TO BE BOUND BY THE TERMS AND CONDITIONS OF THE MASTER LABOR AGREEMENT COVERING CARPENTERS AND ALLIED BUILDING CONSTRUCTION TRADES AND AGREE TO PAY UNION WAGE RATES AND MAKE HEALTH AND WELFARE PENSION VACATION AND APPRENTICESHIP FUND CONTRIBUTIONS REQUIRED BY THE AGREEMENT THE CURRENT SCALES AND RATES ARE

WAGE SCALE

50%

HEALTH & WELFARE CONTRIBUTION

PER HR.

PENSION BENEFIT CONTRIBUTION

PER HR.

VACATION FUND CONTRIBUTION

PER HR.

APPRENTICESHIP TRAINING CONTRIBUTION

PER HR.

BY

AUTHORIZED REPRESENTATIVE

Ed Borge

LOCAL NO

25

PHONE

ANY MEMBER ACCEPTING THIS REFERRAL AND NOT REPORTING TO THE JOBSITE MUST IMMEDIATELY NOTIFY THE OFFICE OF THIS LOCAL UNION.

REPORT TO STEWARD  
BEFORE GOING TO WORK

UNION COPY

EXHIBIT 60, Work Referral Slip

WORK REFERRAL  
LOS ANGELES COUNTY  
DISTRICT COUNCIL OF CARPENTERS

G. A. MCCULLOCH  
SEC'Y., TREAS.

D 1204

DATE

6/4/68

INTRODUCING  
MR

Milton Taylor

SOCIAL  
SECURITY NO

MEMBERS  
LOCAL #

25

NAME OF EMPLOYER

E. H. Baker

FOREMAN OR SUPT

309 Westmontland

JOB SITE ADDRESS

CITY

Reg

REMARKS

NOTE THIS WORKMAN IS DISPATCHED AS SPECIFIED BY YOUR REQUEST BY THE ACCEPTANCE OF THIS REFERRAL AND THE EMPLOYMENT OF THIS WORKMAN YOU AGREE TO BE BOUND BY THE TERMS AND CONDITIONS OF THE MASTER LABOR AGREEMENT COVERING CARPENTERS AND ALLIED BUILDING CONSTRUCTION TRADES AND AGREE TO PAY UNION WAGE RATES AND MAKE HEALTH AND WELFARE PENSION VACATION AND APPRENTICESHIP FUND CONTRIBUTIONS REQUIRED BY THE AGREEMENT THE CURRENT SCALES AND RATES ARE

WAGE SCALE

50%

HEALTH & WELFARE CONTRIBUTION

PER HR.

PENSION BENEFIT CONTRIBUTION

PER HR.

VACATION FUND CONTRIBUTION

PER HR.

APPRENTICESHIP TRAINING CONTRIBUTION

PER HR.

BY

AUTHORIZED REPRESENTATIVE

Ed Borge

LOCAL NO

25

PHONE

ANY MEMBER ACCEPTING THIS REFERRAL AND NOT REPORTING TO THE JOBSITE MUST IMMEDIATELY NOTIFY THE OFFICE OF THIS LOCAL UNION.

REPORT TO STEWARD  
BEFORE GOING TO WORK

UNION COPY

EXHIBIT 61, Work Referral Slip

BEST COPY AVAILABLE

CARPENTERS HEALTH & WELFARE TRUST FOR SOUTHERN CALIFORNIA  
ELIGIBILITY DEPARTMENT

Employee's Name A. WALKER SS# 507-05-1119  
Eligibility Period \_\_\_\_\_  
Form #CT-106

Month	Employer	Lic #	Hours Claimed	Hours Reported
1-67	Noyes Paved Co.	151220		20
2-67	Continental & Walbrook Co.	92	420	51
3-67	Pozzo Construction Co.	151220	2015	22
4-67	"	151220		109
4-67	"	151220		
5-67	"	151220		111
6-67	"	151220		120
7-67				None
8-67				None
9-67	Continental & Walbrook Co.	92		109

EXHIBIT 62, Walker Health & Welfare Records  
(first of 5 pages)

CARPENTERS HEALTH & WELFARE TRUST FOR SOUTHERN CALIFORNIA  
ELIGIBILITY DEPARTMENT

Employee's Name Blair Blancarte SS# 507-12-8364  
Eligibility Period \_\_\_\_\_  
Form #CT-106

Month	Employer	Lic #	Hours Claimed	Hours Reported
1-67	Shirley & Associates	919707		172
2-67	Pozzo Construction Co.	151220		16
3-67	Shirley & Associates	919707		118
3-67	Pozzo Construction Co.	151220		172
4-67	"	151220		74
4-67	"	151220		16
5-67	"	151220		172
6-67	"	151220		154
7-67	"	151220		88
8-67	"	151220		156
9-67	"	151220		149

EXHIBIT 63, Blancarte Health & Welfare Records  
(first of 4 pages)

CARPENTERS HEALTH & WELFARE TRUST FOR SOUTHERN CALIFORNIA  
ELIGIBILITY DEPARTMENT

Employee's Name D. Vandenberg SS# 229-14-7-1967  
Eligibility Period \_\_\_\_\_  
Form #CT-106

Month	Employer	Lic #	Hours Claimed	Hours Reported
1-67	W O Newcomb & Sons	229-14-7-1967		122
2-67	W O Newcomb & Sons	229-14-7-1967		122
3-67	"	"		122
4-67	Conkling & Co. Contractors	229-14-7-1967	765.00	122
5-67	Dialwiddie Co. Contractors	229-14-7-1967	774.50	122
6-67	"	"		122
7-67	"	"		122
8-67	"	"		122
9-67	"	"		122

EXHIBIT 64, Vandenberg Health & Welfare Records  
(first of 4 pages)

CARPENTERS HEALTH & WELFARE TRUST FOR SOUTHERN CALIFORNIA  
ELIGIBILITY DEPARTMENT

Employee's Name Joseph Kulcheski SS# 229-14-20-1967  
Eligibility Period \_\_\_\_\_  
Form #CT-106

Month	Employer	Lic #	Hours Claimed	Hours Reported
1-67	E. A. Weitzel - Assoc.	229-14-20-1967		122
2-67	Emil P. Wohl Contractors	229-14-20-1967	49 1/2	122
3-67	"	"		122
4-67	"	"		122
5-67	"	"		None
6-67	"	"		None
7-67	CHRISTIAN & LEONARD	231663		None
8-67	"	"		165
9-67	"	"		114

EXHIBIT 65, Kulcheski Health & Welfare Records



(66)

Month	Employer	Lic #	Hours Claimed	Hours Reported
1-67	DeSmet-Liberty Co. Inc.	152226		82
1-67	Charles H. Herald	152226		7
2-67	DeSmet-Liberty Co. Inc.	152226		112
2-67	Samuel Leroy Brock Co.	152226		20
3-67	Samuel Leroy Brock Co.	170446		12
4-67	" " "	170446		151
5-67	" " "	170446		196
6-67	" " "	170446		130
7-67	" " "	170446		22
8-67	" " "	170446		101
9-67	" " "	170446		8

i

Not approved by Bureau of the I.  
No. 44-81132-1

1. NAME OF LABOR ORGANIZATION (Include local number and affiliation, if any.)  
LOS ANGELES COUNTY DISTRICT COUNCIL OF  
CARPENTERS

Number & Street: 2200 WEST SEVENTH STREET

LOS ANGELES	L.A.	CALIF.	90057
City	County	State	Zip code

8. Have any accounts in banks or other financial institutions held in a name other than that of your organization? Yes No

9. Liquidate or reduce any liabilities without disbursement of cash \_\_\_\_\_

10. Create or participate in the administration of any business enterprises or other organizations which met the definition of a "subsidiary organization" at that time.

11. Acquire any goods or property in any manner other than by purchase or disposal

13. Create or participate in the administration of a trust or other fund as beneficiary.

Is the purpose of the organization the administration of a trust or other fund or organization, a primary purpose of which is to provide benefits for members or their beneficiaries as defined by Section 3(l) of the Act? ☒ ☐

(If the answer to any of the above questions, other than 13 and 14, is "Yes," details must be given which have been answered "Yes.")

Item No.	18. ADDITIONAL INFORMATION
----------	----------------------------

10	LOS ANGELES COUNTY CARPENTERS PUBLISHING ASSO
	2200 WEST SEVENTH STREET LOS ANGELES, CALIF

PURPOSE - ENGAGE IN PUBLISHING OF NEWSPAPERS TO

COMMUNITY ACTIVITIES OF MEMBERS OF L.A. DISTRICT  
FINANCED BY L.A. DISTRICT COMMISSIONERS

	FINANCED BY L.A. DISTRICT COUNCIL OF CARPENTERS
12	CARPENTERS HEALTH AND WELFARE

12	CARPENTERS HEALTH AND WELFARE TRUST FOR SOUTHERN CALIFORNIA
	CARPENTERS PENSION TRUST FOR SOUTHERN CALIFORNIA

11 COUNTY CARPENTERS VACATION SAVINGS PLAN  
412 WEST SIXTH STREET

LOS ANGELES, CALIFORNIA 90014

12	SOUTHERN CALIFORNIA LUMBER INDUSTRY RETIREMENT 117 WEST NINTH STREET
----	---

117 WEST NINTH STREET  
LOS ANGELES, CALIFORNIA

11	WRITE-OFF OF LOAN TO CARPENTERS LOCAL 2185 PER BOARD ACTION
----	---

BOARD ACTION.	

10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46	47	48	49	50	51	52	53	54	55	56	57	58	59	60	61	62	63	64	65	66	67	68	69	70	71	72	73	74	75	76	77	78	79	80	81	82	83	84	85	86	87	88	89	90	91	92	93	94	95	96	97	98	99	100
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[illegible][illegible]

	312	117	135	S-1
--	-----	-----	-----	-----

(If more space is needed, attach additional sheets with further statement, properly identified.)

Each of the undersigned officers of the above labor organization declares that he is the officer required to sign this report and that the information contained in this report and any accompanying documents, is to the best of his knowledge and belief, true, correct, and complete.

71. SIGNED: \_\_\_\_\_, PRESIDENT

City \_\_\_\_\_ State \_\_\_\_\_ Date \_\_\_\_\_

City	State	Date	Title (above.)	City	State	Date	Title (above.)
Barnesville	Georgia	March 1964					

EXHIBIT 72, District Council Annual Report EN-7-

EN<sup>2</sup>7:-

COPY

U.S. DEPARTMENT OF LABOR  
Office of Labor-Management and  
Welfare on Reports  
Washington, D.C. 20210

# LABOR ORGANIZATION ANNUAL REPORT

FORM LM-2

READ INSTRUCTIONS CAREFULLY BEFORE PREPARING REPORT

1. NAME OF ORGANIZATION  
UNITED BROTHERHOOD OF CARPENTERS AND  
JOINERS OF AMERICA - CARPENTERS LOCAL 25

2. PERIOD  
COVERED  
BY THIS  
REPORT

From 7 1 71 To 6 30 72

3. CITY, COUNTY AND STATE WHERE CHARTERED TO ORIGIN  
LOS ANGELES LOS ANGELES CALIF

4. UNIT NUMBER  
75

5. MAILING ADDRESS  
(For filing with the Union)

JIM KEEN 756 S. LAKE ST.  
LOS ANGELES CALIF 90057

6. Are there any changes in the address listed in item 5? If "Yes," give address in item 14.

DURING THE REPORTING PERIOD DID YOUR ORGANIZATION DIRECTLY OR INDIRECTLY:

8. Given any security in banks or other financial institutions held in a name other than that of your organization? ☐ Yes ☒ No
9. Liquidated or reduced any liabilities without disbursement of cash? ☐ Yes ☒ No
10. Created or participated in the administration of any business enterprises or other organizations which met the definition of a "subsidiary organization" as that term is defined in the instructions on page 37? ☐ Yes ☒ No
11. Acquired any goods or property in any manner other than by purchase or dispose of such property in any manner other than by sale? ☐ Yes ☒ No
12. Created or participated in the administration of a trust or other fund or organization, a primary purpose of which is to provide benefits for members or their beneficiaries as defined by Section 3(i) of the Act? ☒ Yes ☐ No

INDICATE BELOW ANY CHANGES IN THE LABOR ORGANIZATION INFORMATION REPORT (LM-1) WHICH HAVE NOT BEEN PREVIOUSLY REPORTED

13. Does the address in item 5 represent a change? ☐ Yes ☒ No
14. Has there been a change in officers? ☐ Yes ☒ No
15. Have there been any other changes? ☐ Yes ☒ No

AS OF THE END OF THE REPORTING PERIOD

16. Were any assets pledged as security or encumbered in any other way? ☐ Yes ☒ No
17. Did your organization have any contingent liabilities? ☐ Yes ☒ No

If the answer to any of the above questions, other than 13 and 14, is "Yes," details must be provided in item 18 below. See specific instructions for items which have been answered "Yes."

## 18. ADDITIONAL INFORMATION

12. The local Union participates in the following trust funds:  
(A) Carpenters Health & Welfare Trust for Southern California  
(B) Carpenters Pension Trust for Southern California

Where required by law, the above trust funds have filed the applicable reports with the Secretary of Labor under the Pension and Welfare Disclosure Act.

Purposes:

- (A) To provide medical benefits for members  
(B) To provide pension benefits for members

15. Monthly dues increased to 13.85 7-1-71

(If more space is needed, attach additional sheets with further statement, properly identified.)

Each of the undersigned officers of the above labor organization declares that he is the officer required to sign this report and that the information contained on this report and any accompanying documents is to the best of his knowledge and belief, true, correct, and complete.

By R. F. Brubaker PRESIDENT  
By James J. ... SECRETARY

By James J. ... TREASURER  
By James J. ... ...

Form LM-2 Rev. 3-59 Page 1

-1-

EX-73

EXHIBIT 73, Local 25 Annual Report  
(first of 6 pages)

## CARPENTERS HEALTH & WELFARE TRUST FOR SOUTHERN CALIFORNIA ELIGIBILITY DEPARTMENT

EMPLOYEE'S NAME E. M. Marquez SSN 545-46-7045

Eligibility Period Jan. 1, 1967 Thru Dec. 31, 1968  
Form FCI-106

Month	Employer	Lic #	Hours Claimed	Hours Reported
Jan. 1967	R. & R. Builders	173438		12
Feb.	" " "	" "		39
Mar.	Mellie & Senerson	99031		43
Apr.	Mellie & Senerson	193646		88
May	Connell, Inc.	99031		6
Jun.	R. & R. Builders	173438		12
July	" " "	" "		96
Aug.	Almena Const. Co.	185252		11
Sep.	unsub. to state R.R.	180068		49
Oct.	" " "	" "		0
Nov.	R. & R. Builders	173438		44
Dec.	" " "	" "		96
Jan. 1968				0
Feb.	R. & R. Builders	173438		40
Mar.	" " "	" "		132
Apr.	J. B. Development	(228769)		0
May	Monarch Const. Co.	42278		97
Jun.	Timberline Const. Co. Inc.	180323		0
July	Monarch Const. Co.	42278		193
Aug.	" " "	" "		188
Sep.	" " "	" "		131
Oct.	" " "	" "		192
Nov.	" " "	" "		129
Dec.	" " "	" "		128

EXHIBIT 82, Marquez, Hernandez and Russell Health  
and Welfare Records (first of 3 pages)



PAYROLL No. 13 SHEETPROJECT W. H. H. H.LOCATION W. H. H. H.WEEKLY PAY ROLL  
STEELFORM CONTRACTING CO.PAYROLL BY W. H. H. H.WEEK ENDING 4-14-67

1967

	NAME													TOTAL HOURS	RATE PER HOUR	TOTAL WAGES EARNED	DEDUCTIONS				TOTAL DEDUCTIONS	NET PAYMENT	CHECK NO.															
		1	2	3	4	5	6	7	8	9	10	11	12				UN. INS.	C A B	W T	OTHER																		
1	John C. 7																																					
2	John C. 7	8	7	4	8	7								40		309	60																					
3		8	8	8	8	8								40	124	309	60																					
4	John C. 7	7	7	7	7	7								40	5	309	60																					
5	John C. 7	7	7	7	7	7										309	60																					
6	John C. 7	8		8	8	8								32		167	68																					
7	John C. 7	7	8	8	8	8								40		409	60																					
8	John C. 7	8	7	8	8	8								16		83	8																					
9	John C. 7		7											8		41	82																					
10	John C. 7		7											8		41	82																					
11	John C. 7	8		8										16	501	91	36																					
12	John C. 7			8	8	8								32	400	133	60																					
13	John C. 7	8	8	7	8	8								40	117	167	60																					
14	John C. 7	8	7	8	8	8								40		167	60																					
15	John C. 7	8	7	8	8	8								40		167	60																					
16	John C. 7				8									8		33	8																					
17																																						
18																																						
19	TYPE OF HEARING																																					
20	CASE NO.	751866																																				
21	EXH. NO.	83																																				
22	ADMITTED IN EVIDENCE																																					
23	DATE	1/22/73																																				
24	BY	WILLIAM G. SHARP, COUNTY CLERK																																				
25		BY: [Signature] DEPUTY																																				
26	TOTALS													181		23896																						

TYPE OF HEARING

CASE NO. 951866EXH. NO. 83

ADMITTED IN EVIDENCE

DATE 1/22/73

WILLIAM G. SHARP, COUNTY CLERK

BY W. G. Chappell DEPUTY



# WORK REFERRAL

LOS ANGELES COUNTY

DISTRICT COUNCIL OF CARPENTERS

G. A. McCulloch  
SECY., TREAS.

G 70151

DATE 5/3/67

INTRODUCING  
MR.

SOCIAL  
SECURITY NO.

NAME OF EMPLOYEE

FOREMAN OR SUPT.

CITY

REMARKS

NOTE: THIS WORKMAN IS DISPATCHED AS SPECIFIED BY YOUR REQUEST. BY THE ACCEPTANCE OF THIS REFERRAL AND THE EMPLOYMENT OF THIS WORKMAN, YOU AGREE TO BE BOUND BY THE TERMS AND CONDITIONS OF THE "MASTER LABOR AGREEMENT", COVERING CARPENTERS AND ALLIED BUILDING CONSTRUCTION TRADES, AND AGREE TO PAY UNION WAGE RATES AND MAKE HEALTH AND WELFARE, PENSION, VACATION AND APPRENTICESHIP FUND CONTRIBUTIONS REQUIRED BY THE AGREEMENT. THE CURRENT SCALES AND RATES ARE:

WAGE SCALE  
HEALTH & WELFARE CONTRIBUTION 23¢ PER HR  
PENSION BENEFIT CONTRIBUTION 30¢ PER HR  
VACATION FUND CONTRIBUTION 15¢ PER HR  
APPRENTICESHIP TRAINING CONTRIBUTION 1/4¢ PER HR

BY AUTHORIZED REPRESENTATIVE LOCAL NO. 25

ANY MEMBER ACCEPTING THIS REFERRAL AND NOT REPORTING TO THE JOBSITE MUST IMMEDIATELY NOTIFY THE OFFICE OF THIS LOCAL UNION.

REPORT TO STEWARD  
BEFORE GOING TO WORK

UNION COPY

EXHIBIT 84, Work Fererral Slips  
(first of 14 pages)

TURNER CONSTRUCTION COMPANY, and  
ROBERT E. MCKEE GENERAL CONTRACTOR, INC.  
Joint Venturers for the Atlantic Richfield Plaza  
535 South Flower Street  
Los Angeles, California 90017

Employee Name (Carpenters Only)	Social Security No.	Date of Hire	Date of Termination
1 TGC, TAMU 34	575-30-4017	11-12-68	9-19-69
2 HARTIN, ALLEN S.	576-92-3754	11-19-68	8-29-69
3 BOOKS, HAROLD A.	412-10-6092	11-22-68	6-30-70
4 HILL, RICHARD T.	147-10-5495	11-22-68	12-19-68
5 MOORE, NICHOLAS D.	064-07-1446	11-25-68	2-22-69
6 ZWIRNER, HERBERT P.	549-38-4636	12-2-68	12-27-68
7 AKMAL, AHSAN	210-09-5700	12-4-68	7-16-71
8 BUTTE, WILLIAM E.	544-26-7074	12-10-68	2-10-69
9 JACOBS, GEORGE Z.	435-24-9211	12-9-68	2-10-69
10 PUGH, RUBIN	428-07-7663	12-9-68	12-27-68
11 RENTERIA, JAMES	571-38-3732	12-10-68	6-20-69
12 SMITH, EVERETT W.	439-12-4439	12-10-68	5-23-69
13 CAPPELLO, JOHN	066-03-4177	12-12-68	12-31-68
14 TAYLOR, JOHN	558-28-3324	12-12-68	12-19-68
15 WEDDING, PAUL J.	544-06-8622	12-17-68	1-14-69
16 INO, MASAKI	575-09-6725	1-6-69	8-28-70
17 KAGIYAMA, MINEO	575-05-8548	1-13-69	7-6-70

## ANALYSIS OF EARNINGS

RICHARD T. HILL

SOCIAL SECURITY No. 147-10-5495

1968	Gross	\$20.26
1969	-	\$241.20
1970	-	\$8,350.62
1971	-	\$1,646.08
1972	-	\$2,195.85

Certified to be a true  
and exact analysis of  
our records.

TYPE OF HEARING

CASE NO. 951866

EXH. NO. 85

ADMITTED IN EVIDENCE

DATE 1/23/73

WILLIAM G. SHARP, COUNTY CLERK

BY [Signature] DEPUTY

Turner McKee

Lester R. Hight

Project Accountant

January 17, 1973

EXHIBIT 85, Turner Construction Co. records

# VINNELL CORPORATION

GENERAL CONTRACTORS 1145 WESTMINSTER AVENUE

SINCE 1931

August 6, 1971

ALHAMBRA  
CALIFORNIA 91802  
(213) 883-9121  
TELEX 87-7088

Mr. G. Dana Hobart  
Coleman, Silverstein & Hobart  
3540 Wilshire Boulevard - Suite 510  
Los Angeles, California 90010

Dear Mr. Hobart:

Re: Subpoena Duces Tecum  
Superior Court Case No. 951 866 Los Angeles County  
Richard T. Hill vs. United Brotherhood of Carpenters

In accordance with our telephone conversation concerning the payroll records of our Building Division for construction of the U.S.C. School of Dentistry during the month of January 1968, we are enclosing Xerox copies of the following:

1. Payroll Journals for the weeks ended January 7, 1968 - January 14, 1968 - January 21, 1968 and January 28, 1968 listing all employees, their craft and their weekly earnings.
2. Federal Withholding Wage and Tax Statement for 1968 for each of the carpenters employed on that project as indicated in the Payroll Journals.
3. Earnings record for each carpenter as per numbers one and two above. Please note that the records for a few of the carpenters are not completed for 1970 by a weekly posting of earnings as our accounting was switched from hand posting to an electronic data processing system in late 1968. If that detailed information is necessary, it is available in our Alhambra records, however, the paper work is voluminous and would be difficult and costly to copy in the same manner as the enclosures.

We trust these presentations will supply the information you require under the subpoena.

Yours very truly,

VINNELL CORPORATION

By *Wm. L. Hilger*  
Wm. L. Hilger, Secretary

/s/  
Enclosures

EXHIBIT 95, Vinnell Corporation records  
(covering letter and 42 pages of attachments,  
covering letter reproduced)

## GUST K. NEWBERG CONSTRUCTION CO. GENERAL CONTRACTORS

CHICAGO OFFICE  
2040 N. ASHLAND AVE  
CHICAGO, ILL.

2120 WEST EIGHTH STREET - SUITE 303  
LOS ANGELES, CALIFORNIA 90057

(213) 388 2161

MIAMI OFFICE  
12200 N.E. 14TH AVE  
NORTH MIAMI, FLORIDA

January 5, 1973

Coleman, Silverstein & Hobart  
3008 Wilshire Blvd., Suite 200  
Los Angeles, California 90010

Attn: Mr. G. Dana Hobart

Re: Richard T. Hill vs.  
United Brotherhood of Carpenters

Gentlemen:

Attached find a list of carpenters who worked for the Gust K. Newberg Construction Co. on the Criminal Courts Project during the months of January, February and March, 1969.

This is a complete listing with dates of hiring and termination and hours worked during each work week as indicated.

Please note that the Project started on January 30, 1969.

If you have further questions please contact the writer.

Thank you.

Very truly yours,

GUST K. NEWBERG CONSTRUCTION CO.

MSJ/ga  
Encl.  
cc: File

*Mort S. Juhl*  
Mort S. Juhl  
Vice President

EXHIBIT 96, Gust K. Newberg Records  
(one page with covering letters;  
letters reproduced)



**WORK REFERRAL**  
LOS ANGELES COUNTY  
DISTRICT COUNCIL OF CARPENTERS

G. A. McCulloch  
Sec'y. TREAS. **G 75908**

DATE 12/12/66

INTRODUCING MR. R. T. Hill

SOCIAL SECURITY NO. \_\_\_\_\_

NAME OF EMPLOYER C. L. Peck

FOREMAN OR SURE 520 So Springs

JOB SITE ADDRESS \_\_\_\_\_

CITY \_\_\_\_\_

REMARKS STEWART

NOTE: THIS WORKMAN IS DISPATCHED AS SPECIFIED BY YOUR REQUEST. BY THE ACCEPTANCE OF THIS REFERRAL AND THE EMPLOYMENT OF THIS WORKMAN, YOU AGREE TO BE BOUND BY THE TERMS AND CONDITIONS OF THE "MASTER LABOR AGREEMENT", COVERING CARPENTERS AND ALLIED BUILDING CONSTRUCTION TRADES, AND AGREE TO PAY UNION WAGE RATES AND MAKE HEALTH AND WELFARE, PENSION, VACATION AND APPRENTICESHIP FUND CONTRIBUTIONS REQUIRED BY THE AGREEMENT. THE CURRENT SCALES AND RATES ARE:

WAGE SCALE	
HEALTH & WELFARE CONTRIBUTION	23¢ PER HR.
PENSION BENEFIT CONTRIBUTION	30¢ PER HR.
VACATION FUND CONTRIBUTION	15¢ PER HR.
APPRENTICESHIP TRAINING CONTRIBUTION	16¢ PER HR.

BY C. L. Peck LOCAL NO. 25

AUTHORIZED REPRESENTATIVE \_\_\_\_\_ PHONE \_\_\_\_\_

ANY MEMBER ACCEPTING THIS REFERRAL AND NOT REPORTING TO THE JOBSITE MUST IMMEDIATELY NOTIFY THE OFFICE OF THIS LOCAL UNION.

**REPORT TO STEWARD  
BEFORE GOING TO WORK**

UNION COPY  
EXHIBIT D, Work Referral Slip

C. L. PECK, Contractor  
371 Shatto Place  
Los Angeles, California 90003

TYPE OF HEARING Final  
CASE NO. 951866  
EXH. NO. E  
**ADMITTED IN EVIDENCE**  
DATE DEC 29 1972  
BY W. G. SHARP COUNTY CLERK  
M. Brick DEPUTY

23 December 1966

District Council of Carpenters  
2200 West 7th Street  
Los Angeles, California

Attention: Blackie Daley

This is notification of our intention to layoff Richard T. Hill, Carpenter Stewart, at our Briggs Parking project, 524 South Spring Street, Los Angeles, at the close of the working day, Tuesday December 27, 1966.

The primary reason for this layoff is that Richard T. Hill failed to report for work on a two-man crew on December 22nd and 23rd, a time when he was needed to complete the working force.

We trust this action will meet with your approval.

Pete Sorenson

PETE SORENSON  
Superintendent  
for C. L. PECK, CONTRACTOR

ps:ef

cc: J. Martin

NATIONAL LABOR RELATIONS BOARD  
Docket No. \_\_\_\_\_ OFFICIAL EXHIBIT NO. RSR-4

Disposition { Identified \_\_\_\_\_  
Received ☒  
Rejected \_\_\_\_\_

In the matter of \_\_\_\_\_  
Case \_\_\_\_\_ Witness \_\_\_\_\_ Reporter \_\_\_\_\_  
Ex. Files \_\_\_\_\_

EXHIBIT E, Letters

**BEST COPY AVAILABLE**



EX 1

CARPENTERS HEALTH & WELFARE TRUST FOR SOUTHERN CALIFORNIA  
ELIGIBILITY DEPARTMENT

Employee's Name Art Mascott SS# 019-11-00000  
Eligibility Period \_\_\_\_\_  
Form #CT-106

Month	Employer	Id #	Hours Claimed	Hours Reported
1-67	Harris & Langley Corp	154670		112
2-67				None
3-67				None
4-67				None
5-67	Davidson Co. Service	234744		126
6-67	" "	234744		None
7-67				None
8-67	G.A. Quinn Co. Service	179404		32
8-67	" "	179404		32
9-67	" "	179404		32

EXHIBIT I, Mascott Health & Welfare Records  
(first of 4 pages)

WORK REFERRAL  
LOS ANGELES COUNTY  
DISTRICT COUNCIL OF CARPENTERS

G. A. McCulloch  
SECY., TREAS.

B 0261

DATE 4/11/68

INTRODUCING  
MR. Art Mascott

SOCIAL  
SECURITY NO.

MEMBERS  
LOCAL # 25

NAME OF EMPLOYER

FOREMAN OR SUPT.

JOB SITE ADDRESS

CITY

REMARKS

NOTE: THIS WORKMAN IS DISPATCHED AS SPECIFIED BY YOUR REQUEST. BY THE  
ACCEPTANCE OF THIS REFERRAL AND THE EMPLOYMENT OF THIS WORKMAN, YOU  
AGREE TO BE BOUND BY THE TERMS AND CONDITIONS OF THE "MASTER LARSON  
AGREEMENT", COVERING CARPENTERS AND ALLIED BUILDING CONSTRUCTION  
TRADES, AND AGREE TO PAY UNION WAGE RATES AND MAKE HEALTH AND WEL-  
FARE, PENSION, VACATION AND APPRENTICESHIP FUND CONTRIBUTIONS REQUIRED  
BY THE AGREEMENT. THE CURRENT RATES AND RATES ARE:

WAGE SCALE 504  
HEALTH & WELFARE CONTRIBUTION 204 PER HR.  
PENSION BENEFIT CONTRIBUTION 304 PER HR.  
VACATION FUND CONTRIBUTION 154 PER HR.  
APPRENTICESHIP TRAINING CONTRIBUTION 144 PER HR.

BY E. J. Baily AUTHORIZED REPRESENTATIVE LOCAL NO. 25

ANY MEMBER ACCEPTING THIS REFERRAL AND NOT REPORTING TO  
THE JOBSITE MUST IMMEDIATELY NOTIFY THE OFFICE OF THIS  
LOCAL UNION.

REPORT TO STEWARD  
BEFORE GOING TO WORK

UNION CO. V

TYPE OF HEARING

CASE NO. 951866

EXH. NO. J

ADMITTED IN EVIDENCE

DATE 1/2/73

WILLIAM G. SHARP, COUNTY CLERK

BY W. G. Sharp DEPUTY

EXHIBIT J, Work Referral Slip

BEST COPY AVAILABLE

# **PAR** CRANE SERVICE INC.

427 EAST EL SEGUNDO BLVD. - COMPTON, CALIF. 90222  
NEVADA 6-1126 Nite Phone: TOPAZ 9-9683

4/11/68  
R. H. Hill reported  
for work and refused  
to start work because  
I would not guarantee  
his job. signed  
Walter B. 8261  
Emilio Ruiz  
FOREMAN  
STEEL FORM PORT CO  
800 W. 2nd St.

TYPE OF HEARING  
CASE NO. 951866  
EXH. NO. 1  
ADMITTED IN EVIDENCE  
DATE 1/16/73  
WILLIAM G. SHARP, COUNTY CLERK  
By [Signature] DEPUTY

EXHIBIT K, letter

TYPE OF HEARING  
CASE NO. 951866  
EXH. NO. 1  
ADMITTED IN EVIDENCE  
DATE 1/16/73  
WILLIAM G. SHARP, COUNTY CLERK  
By [Signature] DEPUTY

EXHIBIT L, Rodenfels Health & Welfare Records  
(first of 2 pages)

## CARPENTERS HEALTH & WELFARE TRUST FOR SOUTHERN CALIFORNIA ELIGIBILITY DEPARTMENT

Employee's Name WALTER RODENFELS SS# 295-16-7349

Eligibility Period  
Form CT-106

Month	Employer	Lic. #	Hours Claimed	Hours Reported
Jan-1967				52
FEB-1967				24
MAR-1967				0
APR-1967				0
MAY-1967				72
JUNE-1967				0
JULY-1967				0
AUG-1967				56
SEPT-1967				80
SEPT-1967	Paul Christ	5382		16

## CARPENTERS HEALTH & WELFARE TRUST FOR SOUTHERN CALIFORNIA ELIGIBILITY DEPARTMENT

Employee's Name WALTER RODENFELS SS# 295-16-7349

Eligibility Period  
Form CT-106

Month	Employer	Lic. #	Hours Claimed	Hours Reported
SEPT-1967	Yarnall Corp	85625		64
OCT-1967	Steel Form Center	2169		20
OCT-1967	Yarnall Corp	85625		16
NOV-1967				0
DEC-1967	Bent F Smith Inc	09426		8
DEC-1967	W. J. Dunne & Co. Inc	210007		29
JAN-1968	R. E. McCreary Const	117025		23
JAN-1968	Kemp Bros	147610		14
JAN-1968	W. J. Dunne & Co. Inc	210007		63
FEB-1968	Wm Simpson	22005		48

## CARPENTERS HEALTH & WELFARE TRUST FOR SOUTHERN CALIFORNIA ELIGIBILITY DEPARTMENT

Employee's Name WALTER RODENFELS SS# 295-16-7349

Eligibility Period  
Form CT-106

Month	Employer	Lic. #	Hours Claimed	Hours Reported
FEB-1968	Kemp Bros	147610		52
MAR-1968	Shelton Pollack	180001		48
MAR-1968	D. J. Walker	22496		16
APR-1968	Steel Form Center	2169		96
APR-1968	Shelton Pollack	180001		8
MAY-1968	Rizzo Const	151330		18
MAY-1968	C. J. DeCicco Const	22336		144
JUNE-1968	Steel Form Center	2169		16
JUNE-1968	Leslie Malvest	146417		38
JUNE-1968	C. J. DeCicco Const	22336		56



# WORK REFERRAL

LOS ANGELES COUNTY

DISTRICT COUNCIL OF CARPENTERS

G. A. McCulloch  
SECRETARY

G 78052

DATE 3/1/67

INTRODUCING  
MR.

SOCIAL  
SECURITY NO.

MEMBERS  
LOCAL #

NAME OF EMPLOYER

FOREMAN OR SUPT.

JOB SITE ADDRESS

CITY

REMARKS

NOTE: THIS WORKMAN IS DISPATCHED AS SPECIFIED BY YOUR REQUEST. BY THE ACCEPTANCE OF THIS REFERRAL AND THE EMPLOYMENT OF THIS WORKMAN, YOU AGREE TO BE BOUND BY THE TERMS AND CONDITIONS OF THE "MASTER LABOR AGREEMENT", COVERING CARPENTERS AND ALLIED BUILDING CONSTRUCTION TRADES, AND AGREE TO PAY UNION WAGE RATES AND MAKE HEALTH AND WELFARE, PENSION, VACATION AND APPRENTICESHIP FUND CONTRIBUTIONS REQUIRED BY THE AGREEMENT. THE CURRENT SCALES AND RATES ARE:

WAGE SCALE	
HEALTH & WELFARE CONTRIBUTION	23¢ PER HR.
PENSION BENEFIT CONTRIBUTION	30¢ PER HR.
VACATION FUND CONTRIBUTION	15¢ PER HR.
APPRENTICESHIP TRAINING CONTRIBUTION	1/4¢ PER HR.

BY [Signature] AUTHORIZED REPRESENTATIVE LOCAL NO. 21

PHONE

ANY MEMBER ACCEPTING THIS REFERRAL AND NOT REPORTING TO THE JOBSITE MUST IMMEDIATELY NOTIFY THE OFFICE OF THIS LOCAL UNION.

REPORT TO STEWARD  
BEFORE GOING TO WORK

UNION COPY

EXHIBIT Q - Work Referral Slip

**DINWIDDIE CONSTRUCTION CO.**  
**THE WILLIAM SIMPSON CONSTRUCTION CO.**  
A JOINT VENTURE  
523 WEST SIXTH STREET - ROOM 201  
LOS ANGELES, CALIFORNIA 90014  
TELEPHONE 629-2808

November 28, 1966

Carpenters Local Union 25  
755 South Lake Street  
Los Angeles, California 90057

Gentlemen:

re: Crocker-Citizens Plaza  
611 West 6th Street  
Los Angeles, Calif 90017

We wish to employ Mr. Telford E. Jarrell, social security number 464-22-6820, at above mentioned project, with your approval.

Thanking you in advance, for your cooperation.

TYPE OF HEARING  
CASE NO. 251866 R  
EXH. NO. Lefts  
**ADMITTED IN EVIDENCE**  
DATE Jan 9 - 1967  
WILLIAM G. SHARP, COUNTY CLERK  
Terry Chappell DEPUTY

Respectfully yours,  
[Signature]  
Fred H. Coulson  
Asst. Supt.

FHC:lg

NATIONAL LABOR RELATIONS BOARD  
Case No. 31CB284 OFFICIAL EXHIBIT in resp. (c)  
31CB318

Disposition: ☒ Identified  
☐ Received  
☐ Expired

In Matter of: Construction & Termination  
Re: 4-27-66 Witness: [Signature] P. 22

1. Pages 1

EXHIBIT R, Dinwiddie job requests  
(first of 116 pages)



" MUST " " OF LOCAL 25 " " MUST "  
#1 CLEAN HOUSE " #2 STOP SCHEMES "  
WE CAN START NOW ON NOMINATIONS NIGHT.  
LET US ALL BE THERE, MAY 28, 1968 .AT 8 P.M.  
BE THERE WITH OPEN EARS, AND A CLEAR MIND.  
LET US TRY TO SAVE OUR LOCAL. GET OUR RIGHTS.  
" ASSESSMENTS " " HURT " " LETS PREVENT THEM "  
I Will be there. How about you? Do you like it all?  
NOMINATE TWO B.A. ONLY.  
YES I SEEK YOUR SUPORT, FOR WARDEN.  
NO I AM NOT A YFS MAN, JUST A DEVOTED UNION BROTHER  
CHARLES H. GINGRAS

EXHIBIT V, Campaign literature

WILSHIRE-WESTLAKE OFFICE UNITED CALIFORNIA BANK 2000 WILSHIRE BLVD. LOS ANGELES, CALIF.		CARPENTERS LOCAL UNION No. 25 756 SO. LAKE STREET, LOS ANGELES, CALIF. 90057 TELEPHONE 389 - 1137		General Fund CHECK NUMBER 3323	16-176 1223
		DATE 2 10, 69			
PAY		CARPENTERS LOCAL NO. 25 \$2,517 and 27 cts		DOLLARS \$ 2,517.27	
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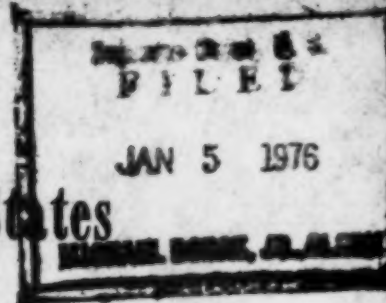
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IN THE  
**Supreme Court of the United States**

October Term, 1975  
No. 75-804



RICHARD T. HILL,

*Petitioner-Respondent,*

vs.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS  
OF AMERICA, LOCAL 25, *et al.*,

*Defendants-Appellants.*

On Petition for a Writ of Certiorari to the Court of Appeal of  
the State of California, Second Appellate District.

**BRIEF FOR PRELIMINARY OPPOSITION.**

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Appellants.*

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*Defendants-Appellants.*

On Petition for a Writ of Certiorari to the Court of Appeal of  
the State of California, Second Appellate District.

**BRIEF FOR PRELIMINARY OPPOSITION.**

Petitioner's references to the opinion below to the jurisdiction of this Court on a Petition for Certiorari are correctly set forth.

**Question Presented.**

The "question presented" as stated by Petitioner is incorrect and does not set forth the basis for the opinion of the Court of Appeal for the State of California nor properly reflect the record nor the basis for the State Court's application of the doctrine of preemption.

The question presented by this case is whether a State may impose compensatory and punitive damages against a Union regarding alleged acts of discrimi-



ation in hiring and dispatching policies of the hiring hall of a Local Union where the National Labor Relations Board has provided a remedy and where all substantive matters of the complaint and the alleged acts of job discrimination are within the exclusive expertise and jurisdiction of the National Labor Relations Board under the National Labor Relations Act of 1947 as amended. (61 Stat. 140, 29 U.S.C. Section 151, *et seq.*)

The State Court found that the crux of the action, the subject matter of the complaint, and the evidence presented involved the employment practices and dispatching procedures of the Local Union and that the case involved discrimination of employment against Petitioner and that the subject matter was within the exclusive jurisdiction of the National Labor Relations Board.

The Petitioner proceeded in the trial court on the theory which was accepted by the trial court that the State law tort of intentional infliction of mental distress was a tort action that could be superimposed as a remedy for Petitioner against Respondent on acts allegedly resulting from job discrimination and the operation of a Union hiring hall. Without regard to the National Labor Relations Board, the Petitioner's theory would allow a State Court, through a judge or a jury, to impose damages, general and punitive, against the Union for acts involving job discrimination and the operation of a Union hiring hall even though the Labor Board had taken jurisdiction and provided a remedy in the form of back pay to the Petitioner.

The question presented by Petitioner is whether the State can invade the exclusive jurisdiction of the Labor Board and impose general and punitive damages against

the Union for such job discrimination on the basis of forming allegations in a complaint on the theory of a State tort of intentional infliction of mental distress and thereby avoid the exclusive jurisdiction of the Labor Board.

An alternate ground presented by the Petitioner in the question presented appears to be a direct attack on the entire principle of Federal preemption and a request for the United States Supreme Court to overrule its longstanding and established preemption doctrine and in effect to overrule the long line of cases of *Garmon v. San Diego District Council of Carpenters*, 359 U.S. 326; *Gardner v. Teamsters Union*, 346 U.S. 485; *Ironworkers v. Perko*, 373 U.S. 701; *Plumbers v. Borden*, 373 U.S. 690; and *Motorcoach Employees v. Lockridge*, 403 U.S. 274 91 S.Ct. (1909).

### Statement of the Case.

#### A. Introduction.

The Respondents, the United Brotherhood of Carpenters and Joiners of America, Local 25, and the Los Angeles County District Council of Carpenters and E. G. Daley (hereinafter referred to as "Respondent"), oppose the Petition for Writ of Certiorari on the grounds that the Court of Appeal for the State of California, Second Appellate District correctly decided the issues in this case. Petitioner filed for a Petition for Hearing before the California Supreme Court which was denied by the California Supreme Court on September 10, 1975.

The conduct involved, which formed the crux of the action and which involved substantially all of the testimony and exhibits in the case concerned the dis-

patchment and employment practices of the Respondent and alleged acts of employment discrimination against Richard T. Hill, (hereinafter referred to as "Petitioner"). The State Court correctly decided that such matters are within the exclusive jurisdiction of the National Labor Relations Board, hereinafter referred to as the "Labor Board" and the federal courts under the Labor Management Relations Act of 1947 (29 U.S.C. Section 151, *et seq.*). The State Court's opinion and holding is completely consistent with the doctrine of preemption as set forth by the United States Supreme Court in numerous cases and is consistent with the prior decisions of the California Supreme Court in applying the doctrine of preemption regarding employment practices of a labor union.

The Petitioner attempted to avoid the established doctrine of preemption by labeling the cause of action as an intentional infliction of mental distress and proceeded to trial and obtained a judgment on this common law tort for compensatory and punitive damages from a jury, although virtually all of the arguments, oral testimony and exhibits introduced at the trial involved a detailed accounting of the hiring practices and dispatching procedures of Local 25. The Petitioner attempted to avoid the application of the preemption doctrine which required that the regulation of the Union Hiring hall is to be within the exclusive expertise and jurisdiction of the Labor Board by attaching a new label to the type of relief requested.

On appeal to the Court of Appeal and upon a Petition for Hearing before the California Supreme Court, Petitioner shifted grounds and attempted to find other justifications for the trial court's error in

not dismissing the action at numerous stages of the trial on the grounds of preemption. On appeal for the first time, Petitioner raised the exceptions to the preemption doctrine which are set forth in the Petition for Certiorari as (1) protecting the interests of the State and Petitioner on matters of public health safety on such items as assault and battery and violence on a picket line; (2) the duty of fair representation; and (3) the claim of internal discipline by the Respondents as against Petitioner as a member of Local 25. Such alternative theories were urged for the first time on appeal before the Court of Appeal and the California Supreme Court in spite of the fact that it was entirely clear and absolute that during the course of the trial, Petitioner was proceeding on the first amended complaint that set forth the common law tort of intentional infliction of mental distress as an exception to the preemption doctrine. Petitioner proceeded on that theory and presented evidence and the conduct involved concerning the dispatching, hiring and employment practices of Local 25 and labeled the claim as a tort of intentional infliction of mental distress which the trial court allowed the jury to impose a substantial damage award in the form of compensatory and punitive damages.

The Court of Appeal and the California Supreme Court accepted the case on the basis presented by Petitioner during the entire course of the trial and determined correctly that the conduct complained of must be reviewed and not the label of the action and that the course of conduct complained of involved employment practices and the procedures and dispatching policies of Local 25 and a claim of employment



discrimination against Petitioner which were matters which were in fact brought before the Labor Board and where additional complaints could have been filed before the Labor Board where appropriate relief and remedies were available.

#### B. Summary of Facts.

The Summary of Facts is set forth in substantial detail in the Decision and Opinion of the Court of Appeal.

The original complaint was filed on April 17, 1969, by Petitioner against Respondent and certain other defendants who were subsequently dismissed from the case. [CT 1].<sup>1</sup> The Respondent filed a demurrer to the Complaint on the issue that the subject matter of the complaint was preempted by the Federal law and the Labor Board. [CT 24.] The Superior Court which is the trial court in the State overruled the demurrer. [CT 38.]

The Respondent filed an Answer denying the allegations and setting forth defenses that the complaint did not state a cause of action and that the subject matter of the complaint was preempted by the Federal law and exclusively within the jurisdiction of the Labor Board and the Federal Courts. [CT 39.]

The At Issue Memorandum was filed by Petitioner setting forth as the issue "*suit by Union member v. Unions charging dispatching discrimination*". [CT 43.] (Emphasis added).

<sup>1</sup>References to the Reporter's Transcript will be made herein by the letters "RT" followed by page numbers. References to the Clerk's Transcript will be made by the letters "CT", followed by page numbers.

Petitioner filed a first amended complaint and the Respondent filed demurrers to the four causes of action of the first amended complaint and the Superior Court sustained demurrers to the first, third and fourth causes of action. [CT 88, 123, 127, and 190.] The basis for the demurrers was on the ground that the subject matter was preempted.

As pointed out by the Court of Appeals in its Opinion, the cause of action was stated as follows:

"The critical paragraph (13 of the Second Cause of Action reads: 'During the aforesaid period Defendants, and each of them, made repeated oral threats to Plaintiff to the effect that as long as they controlled the job-dispatching procedures that Plaintiff would be and he was given inferior assignments and be by-passed for work assignments. During the same period, as aforesaid, Defendants and each of them, repeatedly threatened Plaintiff with actual or defacto expulsion from the Union in retaliation for his political activities, and further threatened to deprive [sic] Plaintiff of his ability to earn a living as a carpenter.

Defendants, and each of them, knew or reasonably should have known or expected that their outrageous conduct, threats, intimidation, and words would result in severe emotional, mental and physical damage to Plaintiff.'

The second cause of action further alleged that as a proximate result 'of the intentional and wrongful *discriminatory conduct* practiced by Defendants and each of them as aforesaid Plaintiff has suffered a nervous breakdown, grievous mental anguish and bodily injury making him sick, sore and lame';



(emphasis ours) to his general damage in the sum of \$500,000.00. The complaint also alleged 'all of the aforesaid acts, conduct and *discrimination* by Defendants, and each of them was done deliberately and maliciously' (emphasis ours) for which Hill sought an additional \$500,000.00 as punitive damages."

Respondent made numerous motions prior to and during the trial to dismiss the case on the grounds of preemption. [CT 215, 385, RT 1, 104, 218 and 1940.]

Respondent, following the entry of the judgment made a motion for a new trial before the Superior Court on several grounds including the basis that the subject matter of the case was preempted. [CT 581.]

The Superior Court denied the Motion for a New Trial, as well as refusing to order a remittitur on either the compensatory or punitive damages. [CT 644.]

## ARGUMENT.

1. **The State Court Correctly Determined That the Crux of the Action and the Subject Matter of the Complaint and the Evidence Presented Involved the Employment Practices and Dispatching Procedures and Claimed Discrimination of Employment Against Petitioner Which Were Exclusively Within the Jurisdiction of the Labor Board.**

The doctrine of Federal preemption is a long and established principle of Federal Law that governs this case. The most comprehensive and articulate expression of the preemption doctrine is set forth in the basic case of *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, S.Ct. 773. The United States Supreme Court held that even where the Labor Board refused to act on the merits of the claim where the matter was arguably subject to the provisions of the National Labor Relations Act, the State Courts were not permitted to grant damages and stated at page 244 as follows:

"When it is clear or may fairly be assumed that the activities which a state purports to regulate are protected by Section 7 of the National Labor Relations Act, or constitute an unfair labor practice under Section 8, due regard for the Federal Enactment requires that State jurisdiction must yield to leave the states free to regulate conduct so plainly within the central aim of the Federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by State law. Nor has it mattered whether the States have acted through laws of broad general application rather than law specifi-

cally directed towards the governance of industrial relations. Regardless of the mode adopted, to allow the States to control conduct which is the subject of national regulation would create potential frustration of the national purposes."

The *Garmon* case was applicable to a picketing situation of a Union against an employer. At a later date, the United States Supreme Court applied the principles of Federal preemption and exclusive Labor Board jurisdiction to cases where State Courts had allowed jury verdicts to stand against Labor Unions that were accused of engaging in discriminatory hiring or employment practices involving dispatching procedures of the Union.

In *Plumbers v. Borden*, 373 U.S. 690, 83 S.Ct. 1423, the Plaintiff, a member of a plumbers Local, claimed that he lost an opportunity to work for a construction company because he was refused a job dispatch from the Union. The Plaintiff filed suit against the Local Union seeking damages under the Texas State law for the Union's refusal to dispatch him and alleged that the acts of the Plumbers Union constituted "willful, malicious and discriminatory interference with his right to contract and pursue a lawful occupation", and the Texas Court allowed the case to go to the jury who found that there was job discrimination and awarded damages for loss of earnings, mental suffering and punitive damages. It is important to point out that the allegations of the complaint in the *Borden* case were identical with the allegations in the present case. The United States Supreme Court held that the State Court did not have jurisdiction on the basis of Federal preemption.

In *Ironworkers v. Perko*, 373 U.S. 701, 83 S.Ct. 1429, decided the same day as *Borden*, *supra*, the Supreme Court again upheld the principle of Federal preemption involving the claim of discriminatory conduct of a hiring hall of a Local Union and held that a State Court jury verdict in the amount of \$25,000.00 for loss of employment was preempted and within the exclusive jurisdiction of the Labor Board.

In the *Borden* case, *supra*, the Supreme Court specifically stated as follows:

"The suit involved here was focused primarily if not entirely on the union's action with respect to Borden's efforts to obtain employment. No specific equitable relief was sought directed to Borden's status in the Union, and thus there was no state remedy to 'fill out' by permitting the award of consequential damages. The 'crux' of the action (*Gonzales*, 356 U.S. 618) concerning Borden's employment relations involved conduct arguably subject to the Board's jurisdiction.

Nor do we regard it as significant that Borden's complaint against the Union sounded in contract as well as in tort. It is not the label that fixed the cause of action under State law that controls the determination of relationship between State and Federal jurisdiction. Rather, as stated in *Garmon*, *supra*, 246, 'our concern is with delimiting areas of conduct which must be free from State regulations if National Policy is to be left unhampered'.

In the present case, the conduct on which the suit is centered, whether described in *terms of*

tort or contract is conduct whose lawfulness could initially be judged only by the federal agency vested with exclusive primary jurisdiction to apply federal standards." (Emphasis added.)

In *Tyree v. Edwards*, 287 F.Supp. 589, a three-member Federal District Court held that a law of the State of Alaska concerning the regulation of Union hiring halls was preempted by the exclusive jurisdiction of the Federal Law. The Supreme Court denied certiorari. (393 U.S. 405.) The importance of maintaining a National uniform policy concerning the regulations of Union hiring halls, was emphasized by the three-judge District Court in the *Tyree, supra*, case where the Court stated at page 594 as follows:

"We find that all concerned, the public, labor and employers are most efficiently served by authority vested by Congress in one Federal agency, empowered to reach across the entire nation and bring national consistency to the broad field of labor relations and the related complex problems arising thereunder. The result would be chaotic in the absence of such a consistent policy. Certainly, it is not intended that each of the hundreds of State Courts of the several states be at liberty, individually, to decide these issues, national in scope and implication. Congress so empowered the National Labor Relations Board. And to that agency, for these purposes, it granted exclusive jurisdiction."

In *Motorcoach Employees v. Lockridge*, 403 U.S. 274, 91 S.Ct. 1909, the United States Supreme Court specifically reaffirmed *Borden* and *Perko* and distin-

guished and greatly limited *International Association of Machinists v. Gonzales*, 356 U.S. 617 on the basis that *Gonzales* was limited to the situation where a Union member was suing for restoration of Union membership and that *Gonzales* did not apply concerning a claim of a discriminatory hiring procedure and practices of a Union hiring hall or Union employment practices.

Petitioner attempts to avoid the preemption doctrine by arguing for the *first time on appeal* before the Court of Appeal, that one of the exceptions that has been established by the United States Supreme Court to the preemption doctrine applies to this case. It is important to point out that at no time during the course of the trial did Petitioner urge, or argue or present evidence regarding any exceptions to the preemption doctrine, except the theory that the common law tort of intentional infliction of mental distress is a new exception.

It is clear that none of the established exceptions to the preemption doctrine apply in this case. There was at no time any allegations, proof or evidence provided that there was any assault or battery or physical violence that would come within the exception of *United Automobile Workers v. Russell*, 356 U.S. 635, 78 S.Ct. 932 and *United Construction Workers v. Leburnum Construction Corp.*, 347 U.S. 656, 74 S.Ct. 833. There were no allegations in the complaint nor any evidence provided or any theories furnished that would come within the exception of *Linn v. Plantguard Workers*, 383 U.S. 53, 86 S.Ct. 657. There were no allegations nor any evidence presented nor any arguments made, or instructions given regarding



fair representation which would come within the exception of *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903. At no time did the Petitioner claim that he was expelled from Union membership and sought restoration to membership in Local 25 within the exception of *International Association of Machinists v. Gonzales, supra*.

Furthermore, there were no allegations nor any evidence presented nor instructions given regarding a breach of a collective bargaining agreement that would constitute a claim under Section 301 of the National Labor Relations Act, *supra*.

Finally, there was no claim nor any allegation in the pleadings nor any evidence nor instructions given that the Labor Management and Disclosure Act of 1947, (29 U.S.C. §411) was violated regarding the Respondent's Constitution and Bylaws on any internal discipline of the Petitioner. At no time was there an offer of proof or evidence presented or instructions given that the Petitioner was disciplined by Respondent under its Constitution and Bylaws regarding suspension, fine or expulsion, which would bring the case within one of the exceptions of the preemption doctrine under *International Brotherhood of Boilermakers v. Harde-man*, 401 U.S. 233, 28 L.Ed.2d 10.

**2. The State Court Correctly Decided the Case Based on Established Application of the Preemption Doctrine Which Has Been Consistently Followed by the State Court.**

The leading case in California on this issue is *Directors Guild of America v. Superior Court*, 64 Cal.2d 42, where the plaintiff filed a suit against a Union alleging damages and an injunction on the ground

that the Union arbitrarily excluded him from membership and discriminatorily barred him from employment. Subsequent to the filing of the Superior Court action, the plaintiff brought charges before the Labor Board alleging that the union had committed unfair labor practices.

The California Supreme Court concluded that where the complaint is founded upon employment and job discrimination, under *Borden, supra*, and *Perko, supra*, such matters were preempted and exclusively within the jurisdiction of the Labor Board. The California Supreme Court discussed the issue as to whether an employee has a right to compel membership in a labor organization. On this issue, the Court drew a careful distinction between matters that would affect employment relations and issues that affect exclusively union membership and held that all such matters on employment, even though founded on tort under the California law, must fall within the preemption doctrine. However, where the basis of the complaint involves union membership and the right to such membership, then the State Court does have jurisdiction. In this regard, the California Supreme Court drew this careful distinction in its final conclusion at page 54 as follows:

"We conclude that the instant case does not present the matter for State Court relief; that the crux of the complaint necessarily pertains to employment relations rather than to union membership. As a result, as we have said, the Federal Act preempts. But, in so doing, we do not rule that preemption extends to the lawsuit which, in the words of Borden, 'focus on purely internal union matters, i.e., on relations between the individual plaintiff

and the union not having to do directly with matters of unemployment, . . . ' (373 U.S. 690, 697). The Complaint which draws into issue the right to union membership alone involves the factors which we have discussed above; after a suit which met the foregoing requirements, relief at the State level would be appropriate".

On this basis the California Supreme Court has adopted the clear rule on federal preemption that where Union matters affect the relationships between the plaintiff and the union, having to do with matters of employment, then preemption applies and the State Court does not have jurisdiction. However, where the relationship is purely an ~~internal matter~~, not involving employment relations, and is a matter of a claim of a right to union membership, then the State Court has jurisdiction.

The instant case is consistent with a long line of California cases following the doctrine of preemption. Any reversal of the California State Court in this case would severely dislocate and upset the established principles of law which have been followed in California for many years, drawing a clear line between employment relations where preemption applies and individual member's rights, fair representation, and internal union matters where the State law allows a cause of action. See *Pratt v. Local 63, Film Technicians*, 260 Cal.App.2d 545; *William Shaw v. Metro-Goldwyn-Mayer*, 37 Cal.App.3d 587; *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Superior Court*, 20 Cal.App.3d 517; *Magallanes v. Local 300, Laborers International Union*,

40 Cal.App.3d 809, and *Breiteger v. Columbia Broadcasting System*, 43 Cal.App.3d 283.

Petitioner relies on *Alcorn v. Ambro Engineering, Inc.*, 2 Cal.3d 493. However, the *Alcorn* case has no application to the instant case as to the issue of Federal preemption and the exclusive jurisdiction of the Labor Board was not referred to at any time, nor involved in any way in the case. The *Alcorn* case held that there is a cause of action for an intentional infliction of mental distress on a pleading that an employer representative harassed and intimidated and used racial statements against an employee in a malicious manner which caused the employee to suffer emotional disturbance. Although the involved employee was a union steward, there was no claim made at any time that the Labor Board had jurisdiction or that the employer had committed an unfair labor practice or that any remedy was sought or available from the Labor Board. The *Alcorn* case did not involve employment conduct or the dispatching and hiring procedures of a Union or a claim of job discrimination by the employee that brought suit against the employer.

The decision of the State Court in the instant case was consistent with all prior decisions of the California Supreme Court and the Court of Appeal. The Court of Appeal correctly held that the substance or crux of the action must be looked at to determine whether preemption applies and not at the remedy sought or label of the cause of action as constituting a common law tort of intentional infliction of mental distress. The Court of Appeal correctly concluded that

the Petitioner had proceeded on a cause of action alleging that there was an intentional infliction of mental distress by virtue of the Union's operation of its hiring hall concerning the Petitioner and other carpenters and that there was a claim of a course of conduct that caused employment discrimination against the Petitioner and that this type of regulation of a Union hiring hall was within the exclusive jurisdiction of the Labor Board.

**3. The State Court Was Correct in Its Conclusion That the Crux of the Petitioner's Case Involved the Employment Practices of Local 25 and a Claim of Job Discrimination Which Was Within the Exclusive Jurisdiction of the Labor Board.**

There is no doubt that the jury was allowed by the Trial Court to hear substantial and overwhelming amount of evidence and review dispatching procedures on work lists, dispatch slips, referral slips involving Petitioner and hundreds of other carpenters that register and are dispatched from the hiring hall of Local 25. In effect, the jury was allowed to determine the legality and conduct of the hiring procedures of Local 25. It is clear that if a local jury can pass judgment on the legality of a union hiring hall, then there would be separate determinations throughout the country in the form of compensatory and punitive damages concerning a union's hiring hall procedures and the national policy of uniformity through the regulations of an expert administrative agency and the Federal Courts would be entirely destroyed. For this reason, the Court of Appeal held that the subject matter was preempted regardless of the title of the cause of action.

Respondent would review briefly by summary, the overwhelming number of witnesses and exhibits that were presented by the Petitioner to the jury that went to the conduct and operation of the hiring hall procedures of Local 25.

1. The opening statement by Petitioner's attorney described in great detail the dispatching procedures of Local 25 and outlined that Petitioner intended to prove that he was discriminated against concerning dispatching of jobs, being dispatched to inferior jobs while other members of the union were allowed to "sneak in" and he was sent on short jobs. [RT 148-162.] In addition, Petitioner's attorney, in the opening statement, spent a great deal of time discussing the Dinwiddy-Simpson job and reviewed the proceedings before the Labor Board. [RT 162-166.]

2. The testimony of Ken Scott, the current business agent of Local 25, was presented by Petitioner and involved a series of questions on the dispatching procedures and types of documents used by Local 25 on job referrals, out-of-work lists, request forms, and all other job dispatching procedures. Scott was questioned on dispatching such as signing in, dispatching "sneak ins", requests, rehires, and job transfers. [RT 421.]

3. Petitioner testified concerning the dispatching procedures and the fact that he was not dispatched to jobs from January to March, 1967. [RT 516-521.] He testified in great detail concerning the Dinwiddy-Simpson job which involved the construction of the Crocker Citizens Building at 6th and Grand in Los Angeles. [RT 540.] Petitioner's attorney read from the deposition of Charles Simpson, the superintendent of Dinwiddy-Simpson job, who testified that he had



verbally requested Petitioner to be dispatched. [RT 544-566.] In addition, Petitioner's attorney read from the testimony of Charles Simpson at a hearing before the Labor Board involving the identical situation as to whether Petitioner was discriminated against on employment at Dinwiddy-Simpson job. [RT 566.]

4. Petitioner testified that he filed charges with the District Council alleging that he had been bypassed on the out-of-work list because Local 25 was sending stewards out of order. [RT 594-597.]

5. Petitioner testified concerning other work referrals, including the referral by Gordon McCulloch from the District Council to the Vinnell job. [RT 1690.]

6. Petitioner's attorney stated that he had gone through all of the out-of-work lists up to March 1968. [RT 627.]

7. Petitioner testified concerning the Ruane job claiming he was discriminated against as other carpenters worked for a longer period of time. [RT 631-636.]

8. Petitioner testified that he refused a steel form job and was dispatched on May 1, 1968, to the William Burke job; however, there was no job there. [RT 644.]

9. Petitioner reviewed other jobs where he had been dispatched, such as Weymouth and Crowell [RT 656], the Speer job [RT 658], Progressive Transportation Company [RT 662] and others.

10. Petitioner specifically brought to the attention of the jury, the fact that the Labor Board had found that he was discriminated against with respect to the Dinwiddy-Simpson. Petitioner testified he filed a charge with the Labor Board and that the Labor Board found

that there was discrimination, and that a Notice to Cease and Desist such discrimination and to pay back wages was posted at the hall of the Local 25. [RT 671-674, see Pltf. Ex. 25, which is the Labor Board order finding discrimination on the part of Local 25 and issuing the Cease and Desist Order against further discrimination against Hill and awarding back pay.]

11. Petitioner specified names of political allies of Daley who he claimed received favorite treatment regarding dispatching and listed 16 names. [RT 1027.] Respondent objected to testimony concerning the listing of names of members and then alleging that such members were given favorite treatment in order to show the overall dispatching policies of the Union. [RT 1033.] The Trial Court denied the motion. [RT 1041-1058.]

12. Petitioner introduced further dispatching records to show that there was overall job discrimination. [RT 1049-1058.]

13. Petitioner's attorney recounted all of the out-of-work records he had reviewed for 1967, 1968, and 1969, as well as requests for each month in January, 1968. [RT 1100-1109.]

14. Petitioner called, as an adverse witness, the Respondent E. G. Daley. He was questioned at length regarding the hiring procedures of Local 25 concerning the out-of-work list, the referral system, the picking up of less than 16 hours of work, the signing of the out-of-work list, the stamping if a carpenter refuses a dispatch on two jobs, and had Daley review random out-of-work sheets. [RT 1114-1123.]

15. Petitioner had Daley select random names of carpenters on the out-of-work list to compare whether

such carpenters' dispatch was dispatch by request or by some form of discrimination. The random names were selected on no relationship to Petitioner's claim. The carpenters selected such as Smith, Dejon, Johnson, Mitchell, Roth, Nichols, and other names were used to show the general policy of alleged discrimination practices of Local 25. [RT 1123-1141.] Petitioner reviewed other names such as Faring, Meterlane, Judan, Fretcha, Montoya, Lopez, Clerin, Rodenfels, Lumbrecht, Wagnor, Potino, Elworth, Lopez and with other carpenters concerning whether they were requested or whether they were dispatched out of order. [RT 1142-1175.]

16. Petitioner questioned Daley on other employees that were dispatched such as Andrew Yukas, Lou Altman, Joseph Williams, George Hains, Ed Monty and other names. Respondent objected to the line of questioning on the general hiring practices of Local 25, by throwing out names of carpenters who were listed as being dispatched. [RT 1182-1200.]

17. Petitioner introduced exhibits involving dispatch slips and reviewing the requests and out-of-work lists with Daley and specifying individual carpenters and petitioner would name carpenters who were dispatched without regard to any acts of discrimination. [RT 1239-1339.]

18. Petitioner attempted to show that there was an overall pattern of discrimination and in effect putting the Local 25 dispatching procedures on trial and was not specifically limited to testimony as to the individual acts of discrimination against petitioner. [RT 1239-1339.]

19. Petitioner read to the jury, interrogatories and answers concerning the out-of-work and dispatching records of Local 25 from January 1, 1965, to January 1, 1969, to the effect that many of the files and records were with the Labor Board. [RT 1936.]

20. Petitioner introduced 102 exhibits of which the following exhibits related directly to the employment practices of Local 25 and involved the overall dispatching procedures of the Union. Most of the exhibits did not directly involve Petitioner, but were offered and allowed Petitioner to argue before the jury that Local 25 was engaged in a practice of job discrimination involving many carpenters and to award damages (particularly punitive damages) to punish the union for its overall hiring practices.

The exhibits referring to general employment practices were the following:

Exhibits 1, 2, 3, 4, 5, 7, 8, 16, 18, 19, 20, 21, 22, 23, 26, 27, 28, 29, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 79, 80, 82, 83, 84, 85, 95, 96, 98, and 99.

Specifically, many of the out-of-work sheets were simply groups of records with referrals for periods of weeks or months which were presented for the only purpose of showing that Local 25 operated a discriminatory hiring hall for a period of time and was in no way related to any specific acts of discrimination against petitioner.

4. **The Instruction Given by the Trial Court Regarding the Decision of the Labor Board That Local 25 Did Discriminate Against Petitioner on the Dinwiddy-Simpson Job and Instructing That the Labor Board Award of Back Pay and Allowing the Jury to Impose Damages Including Punitive Damages for the Same Conduct That Was Involved Before the Labor Board Brings This Case and Its Subject Matter and Conduct Within the Preemption Doctrine as the Instruction Allows a Clear Conflict on a Remedy Between the Labor Board and a Local Jury.**

The requirement as to the application of the doctrine of preemption is established by the special instruction offered by the Petitioner and given to the jury that instructed the jury that the Petitioner had received a back pay award from the Labor Board and that the jury could award damages including punitive damages for the same conduct that was held to be in violation of the National Labor Relations Act and within the jurisdiction of the Labor Board.

The special instruction that calls for the doctrine of preemption and which was error, reads as follows:

**"PLAINTIFF'S SPECIAL INSTRUCTION NO:**

There has been received in evidence the fact that plaintiff filed a complaint within the National Labor Relations Board, a governmental agency, and received an award covering wages he would have earned on the Dinwiddy-Simpson job had he been dispatched on May 1, 1967.

The National Labor Relations Board is empowered by law to render awards to compensate for lost wages where it finds that a claimant was unreason-

ably denied employment in violation of certain applicable federal laws.

The plaintiff in this action charges the intentional infliction of severe emotional distress and seeks damages for pain and suffering, for resulting medical expenses incurred, and for punitive damages.

The National Labor Relations Board has limited jurisdiction which does not include the authority to render awards for any of the just-mentioned items of damage." [CT 531.]

Petitioner attempts to distinguish the current case from the cases of *Plumbers v. Borden*, *supra*, and *Ironworkers v. Perko*, *supra* which were held applicable to this case by the Court of Appeal by somehow finding a distinction that the *Borden* and *Perko* cases involved single acts of discrimination on job employment and that the Petitioner was involved in a series of job discrimination actions by the Union.

There is no such distinction set forth in the *Borden* and *Perko* cases by the United States Supreme Court. The principles set forth by the United States Supreme Court were that the employment and dispatching procedures of a Union engaged in interstate commerce are within the exclusive jurisdiction of the Labor Board and must be regulated and governed by the administrative agency that has expertise in labor management relations. The concern of the United States Supreme Court was to prevent State Courts and juries from imposing local standards and regulations of a Union hiring hall which would not comply with the uniform national labor policy.

However, even excepting, for sake of argument, the Petitioner's interpretation of the *Borden* and *Perko*



cases to the effect that such cases only apply on a single act of job discrimination, then it is clear that the Trial Court did not comply with the preemption doctrine in this case.

The Petitioner's special instruction, which is set forth above, refers to a specific act of job discrimination involving the Dinwiddy-Simpson job where the Labor Board had found that Local 25 had committed an unfair labor practice, and awarded back pay. Regarding the specific act of discrimination on a specific job, the Trial Court then instructed the jury that the jury could impose damages for,

"intentional infliction of severe emotional distress and seek damages for pain and suffering for resulting medical expenses incurred and for punitive damages."

The Trial Court went on to instruct the jury that, "The National Labor Relations Board has limited jurisdiction which does not include the authority to render awards for any of the just-mentioned items of damage."

It is clear that the Trial Court, acting on a specific act of job discrimination, involving the Dinwiddy-Simpson job that was within the Labor Board jurisdiction and where the Labor Board found a violation of the federal law and had awarded relief, then superimposed the State tort remedy of intentional infliction of mental distress for the identical act of discrimination that was the subject matter of the Labor Board jurisdiction.

The instruction by the Trial Court and the imposition of compensatory and punitive damages for an act of job discrimination regarding the union's hiring hall,

was the identical subject of the Labor Board jurisdiction. The Labor Board had jurisdiction on the Dinwiddy-Simpson job and did award a remedy which, within its expertise, fulfilled the objective of the National Labor Policy. The Trial Court allowed the jury to impose a substantial damage award against the Union for the identical act which has the direct impact of creating an additional remedy, over and above the Labor Board remedy. It would be difficult to find a better example of the danger that the United States Supreme Court has held must not exist, than the instant case in which a local jury was allowed to penalize and award damages against a Union on acts of job discrimination that are within the scope of the expertise of the national administrative agency.

**5. The Remedies on Job Discrimination and Regulation of Hiring Halls Are Broad and Far Reaching and Effective as Implemented by the Labor Board and Do Not Justify Petitioner's Argument That the Preemption Doctrine Under Garmon Should Be Reversed on the Basis That the Labor Board Does Not Provide an Adequate Remedy in a Situation as the Current Case.**

Petitioner argues that the United States Supreme Court should re-examine *Garmon* and in effect overrule *Garmon* and hold that the State Court has jurisdiction to grant compensatory and punitive damages to an employee who claims job discrimination and abuses concerning a Union operation of a hiring hall. The apparent basis for the petitioner's request for a re-examination by the United States Supreme Court of *Garmon* is the statement set forth in the conclusion of the Petition that states as follows:

"As this case itself illustrates, such as vendettas, fueled as they are by passions which go far beyond the largely economic motivations assumed by the Act are scarcely likely to be deterred by the pin-prick remedial measures available to the Board, measures which are only minimally adequate for their primary intended purpose and largely inadequate to make whole the hapless victims of the kind of outrageous misconduct involved here."

In requesting the United States Supreme Court to reexamine *Garmon* on the basis of an inadequate remedy before the Labor Board, Petitioner completely fails to point out that the remedy for job discrimination and illegal operations of a Union hiring hall were expressly given to the expert administrative regulation of the Labor Board so as to create a National uniform policy.

As pointed out above, if a local jury such as in the instant case, after reviewing weeks of testimony and documents consisting of hundreds of exhibits that involve every detail of a Union hiring hall procedure, can then determine that the hiring has not been operated properly and award substantial damages as in this case, then it is clear the principle of the national uniform labor policy regarding Union hiring halls will be totally destroyed.

The Petitioner gives little faith or credibility to the ability and power of the Labor Board as a national expert administrative agency created by Congress to cure any evils that may exist concerning the operation of a Union hiring hall.

In the particular case involved, the Petitioner did file a charge before the Labor Board and had a hearing before a trial examiner and received an award in the form of back pay in the amount of \$2,500.00. He had filed one other charge which he did not follow through on and there is no basis to indicate that he could not have filed a continuous number of charges before the Labor Board. The Labor Board has a great deal of power and authority and is not limited to ineffective remedies as urged by Petitioner. The Labor Board can issue broad Cease and Desist Orders which are a form of an injunction, can award back pay and if there is a wide pattern of discrimination concerning the operation of a hiring hall, (including the hiring hall of Local 25 as claimed by Petitioner), the Labor Board had the authority to supervise the Union so to prevent discriminatory practices.

The power of the Labor Board to fashion appropriate remedies in this particular area is no longer in question. The Labor Board has created a number of innovative remedies for hiring hall violations including orders for back pay and interest to alleged discriminatees. *NLRB v. Local 542*, 329 F.2d 512; *Local 1566, Longshoreman ILA*, 145 NLRB 1417; *Local 138, Operating Engineers*, 151 NLRB 102; *Local 925, Operating Engineers*, 168 NLRB 818; *Carpenters, Local 180*, 175 NLRB 150.

The Labor Board has gone as far as granting back pay relief to members of a class of discriminatees including those not named in the charge filed with the Labor Board. By such order, the Labor Board has the power to grant class action relief. *NLRB v. Midwest Transfer*, 287 F.2d 443 (3rd Cir. 1961).



The Labor Board has consistently taken jurisdiction over cases where a union has threatened an employee on hiring procedures *Longshoreman, ILA, Local 872 (Isaac Morning)*, 163 NLRB 586 (1968). See *Carpenters District Council of New Orleans and Vicinity, Carpenters Local 1846*, 182 NLRB 11 (1970) where the Labor Board granted a remedy on a factual situation almost identical to the evidence presented by Petitioner in this case.

Another example of the broad powers of the Labor Board is the case of *Castleman and Bates*, 200 NLRB 72, where the Labor Board issued a Cease and Desist Order against a Union preventing it from maintaining, forcing or giving effect to exclusive hiring arrangements or practices where union members received preference or any manner restraining employees in exercise of their rights and ordered back pay. In addition, the Labor Board ordered the Union to keep permanent records of hiring and referral operations adequate to disclose fully the basis on which each referral is made and to make available upon request of the Regional Director of the Labor Board, inspection at all reasonable times, any records relating in any way to the hiring and referral system.

In *NLRB v. Ironworkers, Local 86*, 443 F.2d 544 (9th Cir. 1971), a labor Union was judged in civil contempt for failing to comply with a Court Decree enforcing a Labor Board Order requiring the Union to maintain a hiring hall on a non-discriminatory basis. The United States Court of Appeals for the Ninth Circuit ordered the Union to purge itself of contempt by fully complying with the Labor Board's order as set forth by the Court Decree and posting copies

of the Contempt Order at the Union hiring hall and business offices and mailing copies of the Notice of Contempt to all employers in the construction industry with whom the Local had a signed agreement and to immediately mail copies of the Notice of Contempt to all members of the Local Union and to read the Notice by an official of the Local Union to the members at their next general membership meeting. In addition, the Court ordered the Local Union to fully comply with the hiring hall procedures as ordered by the Labor Board and enforced by the Court for a period of three years. The Court further imposed upon failure of the Union to comply with the order to pay a fine of \$5,000.00 on each future violation plus \$500.00 per day so long as such non-compliance continued. In Appendix A of the Court of Appeals Decision, the hiring hall procedure as required by the Labor Board and enforced by the Court sets forth in detail in exactly the manner of how the Local Union should operate its hiring hall concerning requests and priorities of employment on dispatching. It is particularly important to point out that the Labor Board's order on the hiring hall procedures also requires the Local Union to maintain permanent written records which are open and available for inspection at all reasonable times. The broad authority of the Labor Board to regulate hiring halls of unions is further set forth in Section 12 of the Appendix A of the Opinion that the hiring hall procedures in effect establishes a master who in effect supervises and regulates the hiring hall procedure of the Local Union and serves reports on the Regional Director of the Labor Board. The master can hear any complaint, either oral or written of any applicant or member of the Union



who claims that the hiring hall procedure is not being followed. In effect, the Labor Board and Court of Appeal imposed a Labor Board "Trusteeship" over the operation of the Union's hiring hall.

It is difficult to define more broad and widesweeping powers by an administrative agency such as administered by the Labor Board concerning hiring halls of Local Unions. In this case, if the Petitioner had proceeded with the Labor Board by the filing of additional charges and had requested the Labor Board to conduct a further investigation and upon a finding of the abuses as alleged by the Petitioner, the Labor Board had the authority to provide all possible relief to Petitioner regarding job employment. However, it must be pointed out that the Labor Board as the expert administrative agency could very well have found against Petitioner's allegations and found that there was no abuse or violation of the Local Union's hiring hall operations.

The United States Supreme Court has itself on occasion determined the legality of the operation of the Union hiring hall under the National Labor Relations Act. *Teamsters Local 357 v. NLRB*, 365 U.S. 667 (1961) and *Local 60, United Brotherhood of Carpenters and Joiners of America v. NLRB*, 365 U.S. 651 (1961).

The Court of Appeals has regularly enforced Labor Board orders against Unions for discriminatory referral practices. *Pacific Maritime Association v. NLRB*, 452 F.2d 8 (9th Cir. 1971); *NLRB v. International Longshoremen's Association, Local 1581*, 489 F.2d 635 (5th Cir. 1974); and *NLRB v. Sea Farers International Union*, 496 F.2d 1363 (5th Cir. 1974).

The particulars in a case very similar to the facts as alleged by Petitioner in this case is contained in a decision of the United States Court of Appeals where a Labor Board order was upheld regarding job discrimination. See *NLRB, Local 4, Operating Engineers*, 456 F.2d 242 (1st Cir. 1971).

### Conclusion.

The principles of the United States Supreme Court as established in *Garmon, supra*, *Borden, supra*, *Perko, supra* and *Motorcoach Employees, supra*, were to avoid conflicting regulation of conduct by various official bodies which might have some authority over the subject matter. The State Court properly applied the objectives of the United States Supreme Court in holding that the subject matter of the cause of action in this case was preempted and that it did not matter whether recovery was sought on grounds of statutory or common law tort. The State Court correctly applied the principle that the nature of the activity must be ascertained to determine whether preemption applies. The label of an action as "emotional distress" or some other label that a State Court may attach to a cause of action cannot and should not change the essential nature of the conduct involved in the dispute.

The decision of the State Court accomplished what Congress and the United States Supreme Court have attempted to establish, the avoidance of different labor laws and policies that would be enforced throughout the Country and would vary with local attitudes towards labor Unions.

In *Motorcoach Employees, supra*, the United States Supreme Court made a historic, comprehensive and

articulate review of *Garmon* and subsequent cases and the possible consequences of allowing different tribunals issuing different remedies for the same unfair labor practices. Justice Harlan noted that there could run a spectrum from jail sentences to punitive damages to merely awarding back pay. Such a conflict in remedies in administration throughout the Country with fifty different States applying different remedies would produce a clear conflict between the Federal and State regulatory schemes and would lead to an impossible task of case by case supervision by the United States Supreme Court over matters that Congress intended to be left within the exclusive administration expertise of the Labor Board as interpreted and enforced by the Federal Courts.

The State Court correctly applied the Congressional intent and objectives in philosophy of the United States Supreme Court as set forth in *Garmon* and as recently as 1971 in *Motorcoach Employees*, and for this reason, the Respondents respectfully submit that the Petition for Certiorari should be denied.

Respectfully submitted,

LEO GEFFNER,

*Attorney for Respondents and  
Appellants.*

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1975

No. 75-804

RICHARD T. HILL, *Petitioner*,

v.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS  
OF AMERICA, LOCAL 25, ET AL., *Respondents*.

On Writ of Certiorari to the Court of Appeal of the  
State of California, Second Appellate District

**MOTION TO VACATE AND REMAND  
AND  
MEMORANDUM IN SUPPORT THEREOF**

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SUPREME COURT, U.S.



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---

On Writ of Certiorari to the Court of Appeal of the  
State of California, Second Appellate District

---

**MOTION TO VACATE AND REMAND**

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Respondents move that the judgment of the Second Appellate District of the Court of Appeal of California be vacated and the cause be remanded to that Court for a determination of whether the present action, brought by petitioner, survives his death which took place on January 28, 1976. The grounds for this motion are stated in a memorandum filed herewith.

Respectfully submitted,

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On Writ of Certiorari to the Court of Appeal of the  
State of California, Second Appellate District

---

**MEMORANDUM IN SUPPORT OF  
MOTION TO VACATE AND REMAND**

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On January 26, 1976, this Court granted certiorari to review a judgment of the District Court of Appeal for the State of California. That Court had reversed a judgment entered on behalf of petitioner, the plaintiff in this action, on a jury verdict for \$7500 actual damages and \$175,000 punitive damages for the tort of intentional infliction of emotional distress. The basis

for reversal was that the state courts were without power to award damages for petitioner's claim under the doctrine of *San Diego v. Garmon*, 359 U.S. 236; the appellate court did not pass upon the state law grounds which the defendants had also asserted for setting aside the judgment. The petition for certiorari raises the question whether the District Court of Appeal erred in its application of *Garmon*.

On January 28, 1976, petitioner died.\* The question necessarily arises, therefore, whether Mr. Hill's cause of action survives him, for a decision of the federal, and, in the final analysis constitutional (see *e.g.*, *Perez v. Campbell*, 402 U.S. 637, 644-652), question presented by the petition

"would be inconsistent with our constitutional inability to render advisory opinions, and with our consequent policy of refusing to decide a federal question in a case that might be controlled by a state ground of decision. See *Murdock v. Memphis*, 20 Wall. 590, 634-636." *Bell v. Maryland*, 378 U.S. 226, 237.

Whether the present tort action survives is, of course, a question of state law, which only the California courts can answer authoritatively. Accordingly,

"to let issues of state law be decided by state courts and to preserve our policy of avoiding gra-

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\* At the present writing no administrator has been appointed for petitioner's estate. *Strictissimi juris* therefore, there is no petitioner before this Court. However, Mr. Hill's counsel of record has expressed his intention of filing a brief and appendix without awaiting the appointment of an administrator. Accordingly, the present motion is filed at this time, in order to obviate unnecessary expenses to both sides if, as we believe is appropriate, the case is now remanded.

tuitous decisions of federal questions—we have long followed a uniform practice where a supervening event raises a question of state law pertaining to a case pending on review here. That practice is to vacate and reverse the judgment and remand the case to the state court, so that it may reconsider it in the light of the supervening change in state law." *Id.*

The Court in *Bell* was sharply divided on the question whether that practice should be followed there, because the minority believed that "the national interest imperatively calls for an authoritative decision of the question by this Court" (*id.* at 323, Black, J., dissenting; see also *id.* at 243-245, Douglas, J., dissenting on this point.) But no Justice questioned the general principle which, as the Court's opinion documented, *id.* at 237-241, was based on ample precedent, going back to *Gulf, C. & F. R. Co. v. Dennis*, 224 U.S. 503, and including such unanimous decisions as *Dorchy v. Kansas*, 264 U.S. 286 (Brandeis, J.); *Missouri ex rel. Wabash R. Co. v. Public Service Comm'n.*, 273 U.S. 126 (Stone, J.) and *Patterson v. Alabama*, 294 U.S. 600 (Hughes, C.J.).

To these and the other cases cited in *Bell*, we add one more, *Pagel v. MacLean*, 283 U.S. 266, for there, as here, the intervening circumstance was the death of one of the parties. In an opinion by Justice Stone, the Court reasoned that by virtue of that party's death, the question originally presented by the petition for certiorari "has now become subsidiary to other questions, the determination of which is necessary to the disposition of the present suit and may render unnecessary any adjudication of the rights of the [deceased] mother."



(*Id.* at 268). The case was remanded to the state court for consideration of those "other questions":

"While, in such a situation, the writ may be dismissed, see *Kimball v. Kimball*, 174 U.S. 158, the present is not a proper case for such disposition, which might leave the judgment to be enforced by the respondent administrator without determination of his rights. In order that the state court may be free to deal adequately with the questions which must be determined in order to make appropriate distribution of the fund involved, the judgment will be vacated and the cause remanded for further proceedings not inconsistent with this opinion. *Missouri ex rel. Wabash R. Co. v. Public Serv. Commission*, 273 U.S. 126, 131; *Gulf, C. & S.F. R. Co. v. Dennis*, 224 U.S. 503, 509." (*Id.* at 269).

This course should be followed here.

#### CONCLUSION

For the foregoing reasons the Motion to Vacate and Remand should be granted.

Respectfully submitted,

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MAY 25 1976

MICHAEL RODAK, JR., CLERK

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MEMORANDUM IN OPPOSITION TO  
MOTION TO VACATE AND REMAND

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IN THE  
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ET AL.,

Respondents.

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MEMORANDUM IN OPPOSITION TO  
MOTION TO VACATE AND REMAND

---

On January 26, 1976, this Court granted a Writ of Certiorari to review the decision of the Court of Appeal of the State of California in Hill v. United Brotherhood of Carpenters and Joiners of America (1975) 49 Cal.App.3d 614, 122 Cal.Rptr. 722. Two days later, Petitioner

Richard T. Hill died.<sup>1/</sup> On the basis that it is a question of California law whether Petitioner Hill's judgment survived his death and that that issue can be answered authoritatively only by the California courts, Respondents urge that this Court should vacate the judgment of the Court of Appeal and remand this matter to that court for its determination of the issue. It is submitted, however, that since the California legislature and the California courts have in fact spoken explicitly and authoritatively on the question, no such action by this Court is either necessary or appropriate.<sup>2/</sup>

The subject of the survival of actions in California is covered by Section 573 of the California Probate Code. That Section provides in pertinent part as follows:

"Except as provided in this section, no cause of action shall be lost by

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<sup>1/</sup>

A personal representative has now been appointed and her motion to be substituted in the place and stead of Petitioner Hill is filed concurrently herewith.

<sup>2/</sup>

Respondents make no attempt to show that California law is in any respect unclear on the issue. In fact they do not refer to California law at all.

reason of the death of any person but may be maintained by or against his executor or administrator. . . . When a person having a cause of action dies before judgment, the damages recoverable by his executor or administrator are limited to such loss or damage as the decedent sustained or incurred prior to his death, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had he lived, and shall not include damages for pain, suffering or disfigurement. . . ."

Section 573 and the cases interpreting it make abundantly clear that Petitioner's cause of action against Respondents and the award of damages based thereon were unaffected by the death of Petitioner.

As to the punitive damages portion of the award, Section 573 explicitly provides that such damages are recoverable in spite of the death of a plaintiff. California courts have in fact construed the section to mean precisely what it says in this regard. (Stencel Aero Engineering Corp. v. Superior Court (1976) 56 Cal. App. 3d 978, 983, 128 Cal. Rptr. 691; Dunwoody v. Trapnell (1975) 47 Cal. App. 3d 367, 369-370, 120 Cal. Rptr. 859.)

As to the compensatory damages awarded herein, the jury was explicitly

instructed that no such damages were to be awarded for any harm suffered after April 17, 1969 [C.T. 529], so that there is no question that the compensatory damages recovered were, in the words of the statute, "limited to such loss or damage as the decedent sustained or incurred prior to his death."

The only remaining question is whether Petitioner Hill died "before judgment" within the meaning of Section 573, with the consequence that the compensatory damages award abated to the extent that it may have "include[d] damages for pain, suffering or disfigurement."<sup>3/</sup>

The one reported California appellate decision directly in point on this question leaves no doubt that Petitioner died after judgment for the purposes of Section 573.

<sup>3/</sup> The single cause of action on which the case went to the jury was for intentional infliction of severe emotional distress. It may or may not be that "severe emotional distress" falls within the category of "pain and suffering," as that term is used in Section 573; Petitioner has discovered no authority on the question. The jury did receive an instruction, in addition to those on intentional infliction of emotional distress [C.T. 524-528], as to what constitutes "pain and suffering" [C.T. 523]. This suggests that the Trial Court regarded the two categories of injury as distinct. "Severe emotional distress" and "pain and suffering" to the side, the jury was also instructed that it could award damages for medical and related expenses resulting from Respondents' tortious misconduct [C.T. 522].

In Love v. Wolf (1967) 249 Cal.App.2d 822, 58 Cal.Rptr. 42, the plaintiff obtained a verdict and judgment against one of two defendants for damages for personal injuries. The award included damages for pain and suffering. Deeming the award insufficient, the plaintiff moved for and was granted a new trial against that defendant on the issue of damages only. The defendant involved appealed from the order granting the new trial and from the judgment set aside by that order. While the appeal was pending, the plaintiff died. Her personal representative, perceiving that Section 573 might preclude any recovery for pain and suffering upon retrial, consented to reversal of the order for new trial as to that defendant. The Court of Appeal accepted this waiver and affirmed the judgment against that defendant in its entirety, including such portions of the damages award as were for pain and suffering. The Court of Appeal discussed the effect of the personal representative's waiver of new trial in the following terms:

"The superior court judgment was set aside in its entirety when the court granted a new trial as to damages. 'Taking out that recovery, nothing effective as a judgment remains in existence.' [Citation omitted.] As there can be only a single judgment in an action [Citation omitted], if the order granting the limited new trial on damages is to stand, there will be no final judgment until the trial of that issue ends and the determination



of the appeal, if any, from the then judgment.

"If the order does not stand, the judgment set aside by the order for new trial would be restored and then become final unless reversed. We find nothing in the statute which would require a reversal of a judgment merely because the successful plaintiff died while that judgment was on appeal. Thus, in this case, we would not be concerned with section 573 were it not for the order granting new trial and plaintiff's waiver of her right to a new trial if on that trial section 573 applies." (Id. at p. 840; emphasis added.)

The clear import of Love v. Wolf is thus that the term "before judgment" in Section 573 means before judgment in the trial court, and that the mere fact that the defendant may take an appeal from that judgment can have no effect whatsoever upon any award of damages for pain and suffering, unless, of course, the defendant secures reversal of the judgment upon some other basis.

It might be added that not only is the issue of abatement vel non squarely settled in Petitioner's favor by California law, but the authority

relied upon by Respondents in support of their motion is wholly inapposite. In Bell v. Maryland, 378 U.S. 226 (1964), there occurred following this Court's grant of certiorari a supervening change in the applicable substantive law in the state in which the lawsuit arose, such that "this case [now] involves not only a question of state law but an open and arguable one." (Id. at p. 241.) In Pagel v. MacLean, 283 U.S. 266 (1931), a beneficiary under a policy of veteran's insurance died while the petition for certiorari was pending. This raised new issues under the applicable substantive law, issues which had not been reached by the lower courts and which superceded the issues this Court had granted certiorari to decide. Here, there has been no supervening change in applicable state law and, as has been demonstrated above, state law on the issue of abatement is clear beyond cavil. Moreover, the death of Petitioner Hill has not raised new issues of substantive law eclipsing those upon the basis of which this Court granted certiorari.

## CONCLUSION

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For the foregoing reasons, it is urged that Respondents' Motion to Vacate and Remand should be denied.

Respectfully submitted,

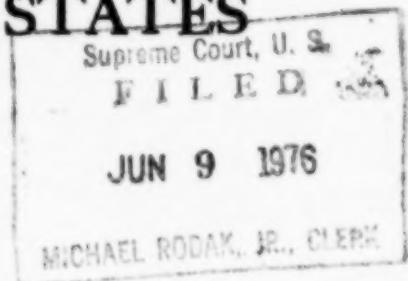
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IN THE  
SUPREME COURT  
OF THE UNITED STATES

October Term, 1975  
No. 75 - 804



JOY A. FARMER, Special  
Administrator of the Estate  
of Richard T. Hill,

Plaintiff-Petitioner,

vs.

UNITED BROTHERHOOD OF  
CARPENTERS AND JOINERS  
OF AMERICA, LOCAL 25,  
et al.,

Defendants-Respondents.

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ON WRIT OF CERTIORARI TO THE  
CALIFORNIA COURT OF APPEAL  
SECOND APPELLATE DISTRICT,  
DIVISION FIVE

---

BRIEF FOR THE PETITIONER

---

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IN THE  
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October Term, 1975  
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JOY A. FARMER, Special Administrator  
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Defendants-Respondents.

---

On Writ of Certiorari to the California  
Court of Appeal, Second Appellate District,  
Division Five

BRIEF FOR THE PETITIONER

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OPINION BELOW

The opinion of the Court of Appeal of the  
State of California is reported at 49 Cal. App. 3d  
614 and at 122 Cal. Rptr. 722. The opinion is  
reproduced as Appendix A to the Petition for  
Writ of Certiorari.

1.

JURISDICTION

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The opinion and judgment of the Court of  
Appeal was filed on June 30, 1975. (See Ap-  
pendix A to Petition for Writ of Certiorari.)  
A timely Petition for Hearing in the California  
Supreme Court was denied without opinion on  
September 10, 1975. (See Appendix B to Peti-  
tion for Writ of Certiorari.) A timely Petition  
for Certiorari was filed in this Court on Decem-  
ber 5, 1975. A Writ of Certiorari was granted  
on January 26, 1976. The jurisdiction of this  
Court is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

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At issue herein is whether a union mem-  
ber who is subjected to protracted and intention-  
al infliction of grievous emotional distress by  
officials of his Union in pursuance of a vicious  
vendetta and in clear violation of state  
tort law may bring an action in state court for  
damages for redress of the injuries done him,  
or whether such action should be deemed pre-  
empted by the Labor-Management Relations Act  
of 1947 (29 U.S.C. §§141, et seq.) and the  
subject matter of the action deemed within  
the exclusive jurisdiction of the National Labor  
Relations Board, when the Act does not address

2.

## STATEMENT OF THE CASE

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### A. Factual Background<sup>1/</sup>

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Plaintiff and Petitioner Richard T. Hill<sup>2/</sup> was at all relevant times a carpenter by trade. (RT 472.) At all relevant times, he belonged to Defendant and Respondent Local 25 of the

<sup>1/</sup>

Because the occurrence of the events giving rise to this lawsuit is not in issue here, Petitioner presents in this brief only a short summary of those events. A more detailed treatment of the facts may be found at pages 4-33 of the Respondent's Brief which Petitioner filed in the Court of Appeal and which is included as part of the record certified to this Court.

<sup>2/</sup>

Mr. Hill died on January 28, 1976, after Certiorari was granted herein. A motion to substitute Joy A. Farmer, special administrator of Mr. Hill's estate, in place of Mr. Hill was granted on June 1, 1976. Because this brief was written and much of it was reproduced prior to receipt of notice that the motion for substitution had been granted, the term "Petitioner" as used herein should be understood as referring to Mr. Hill rather than to Ms. Farmer.

United Brotherhood of Carpenters and Joiners of America. (RT 473.)<sup>3/</sup>

In 1965, Petitioner was elected to a three-year term as vice-president of Local 25. (RT 473-474.) In the course of the performance of his official duties, Petitioner came increasingly into conflict with one of the Local's business agents, Defendant and Respondent E. G. "Blackie" Daley, who, though only one of three business agents for the Local, held effective control of the Local's affairs. (RT 475, 1684, 1900-1901.)

Petitioner disagreed with Daley on a number of subjects, including the way Daley dispatched workers from the Local's hiring hall, the propriety of loans made by the Local's credit union and the use or misuse of union funds. (RT 484-486, 495-496, 498-501.) By the end of 1966 Petitioner and Daley had become openly hostile. (RT 809-810, 1520, 1554.) In early 1967, Petitioner incurred Daley's further displeasure by filing intra-union charges against Daley for misuse of union funds. (RT 587-588.) Somewhat later, Petitioner decided to run for the office of Local president in the 1968 election, and to oppose Daley's re-election as business agent.

<sup>3/</sup>

References to the Reporter's Transcript will be made herein by the letters "RT," followed by page numbers. References to the Clerk's Transcript will be made by the letters "CT," followed by page numbers.



He so informed Daley. (RT 666.)

Petitioner's opposition to Daley and to Daley's policies triggered a campaign of intimidation directed at Petitioner (and sometimes at those seen associating with him) by Daley and those effectively under Daley's control. This campaign, which began in late 1966, took the form of numerous and continuing threats of starvation, frequent public ridicule, incessant verbal abuse, most of it profane, on one occasion interference with Petitioner's performance of his duties as Local vice-president, and on at least one occasion an actual battery. (RT 492, 505, 528-529, 533, 591-593, 1063-1066, 1556-1560, 1598, 1664, 1670, 1685-1686.) More significantly, it involved refusal to dispatch Petitioner from the Local's hiring hall to any but the briefest and least desirable jobs, in violation of express intra-union rules and provisions of the union-management agreement governing the operation of the hiring hall and in contravention of long-established hiring hall practices. (R. T. 249-269, 320-323, 374, 407-408, 429, 440, 539, 1121, 1166-1167, 1197-1198, 1362-1363, 1436, 2625-2630.)

The record establishes that Daley and other Local officials under his control went to extraordinary lengths to prevent Petitioner from obtaining his proper share of work for the express purpose of driving Petitioner from the Local. (RT 529, 533, 1558-1560, 1664.) Daley and his subordinates falsified union records to justify removing Petitioner from the top of the

Local's out-of-work list and placing him at the bottom, thereby causing weeks of unemployment. (RT 507, 881-882, 1230-1231, 1246, 1444, 2639-2658.) They deliberately offered him jobs for which he was not qualified and used his refusal of such jobs as a pretext for placing him at the end of the out-of-work list and effectively out of work for periods of weeks. (RT 507-510, 637-640, 656-660, 2157, 2164-2166.) They dispatched Petitioner to jobs of only a few days' duration, jobs which he would have had a right to refuse without penalty, but of whose short duration he was told nothing, even though the usual practice was to tell the affected member of that fact before he accepted such a dispatch. In two instances, when he went to the jobsite and learned that the employment was of short duration, he refused the job, but was nonetheless moved to the bottom of the out-of-work list. In another, he accepted the job without learning that it would be of short duration and was likewise moved to the bottom of the list. While Petitioner was receiving these short-term dispatches, others under Hill on the out-of-work list were receiving dispatches of several months' duration. (RT 263, 623-624, 636, 647, 1121, 1196-1198, 1362-1363, 1436.) On one occasion, Petitioner was even dispatched to a job that did not exist, effectively preventing him from obtaining one of several good dispatches that day. (RT 642-646; see also 636-640, 2157, 2164-2166, 2173, 2658.)

Unable to secure a job through ordinary hiring hall dispatching procedures, Petitioner

approached potential employers in an attempt to get them to request the hiring hall to dispatch him, a permitted and not uncommon practice for out-of-work carpenters. One employer did specifically request petitioner's dispatch, but Local officials, in violation of hiring hall rules, refused to dispatch Petitioner. (RT 539-559, 572-576, 1505-1508.)

Daley on one occasion also used Petitioner's refusal of a job for which he was not qualified as an excuse to report to the Department of Employment that Petitioner was not available for work, thereby causing Petitioner's unemployment benefits to be cut off pending the Department's review of the matter. It was unprecedented for union officials to report such a refusal to the Department of Employment. (RT 472, 507-518, 1561-1562.)<sup>4/</sup>

Petitioner's attempts to secure redress of the misconduct of Daley and the other officials under his control brought him scant relief. Petitioner complained to the National Labor Relations Board in May of 1967 about the Local's refusal to dispatch him in response to the specific employer request and was awarded some

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<sup>4/</sup>

Petitioner's benefits for the affected period were paid him weeks later. (RT 893.)

\$2500 in lost wages. (RT 671, 2683-2685.)<sup>5/</sup> Far from deterring the misconduct of Daley, however, the charges and the award provoked an even more intense course of threats and intimidation. (RT 675.)

Petitioner also sought redress from the Los Angeles District Council of the United Brotherhood of Carpenters and Joiners, also a Defendant and Respondent herein, several times complaining to it of his mistreatment at Daley's hands. The District Council in each instance refused to do anything in response to Petitioner's entreaties. (RT 579-582, 593-605.)

Through the efforts of Daley and those under his control, Petitioner remained unemployed, except for jobs of brief duration, from early 1967 until mid-1968. (RT 616-624, 2477-2478.) During this time, he was forced to subsist on unemployment benefits, disability benefits

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<sup>5/</sup>

The Court of Appeal correctly noted that this was not the only occasion on which Petitioner went to the Board. (Appendix A to Petition for Writ of Certiorari, p. 23.) The record provides no support, however, for the Court's apparent belief that there were several further charges filed or that any of them concerned job referral discrimination. The record reveals only that one additional charge was filed and later withdrawn. It does not disclose the nature of that charge. (RT 2686-2691.)



and \$2200 in savings bonds which he had accumulated over the years. (RT 576, 609-611.) The frustration of forced idleness, the continuing erosion of his savings and the effects of the open hostility of Daley and other officials loyal to Daley soon took their toll on Petitioner's health. The nervous stress engendered by the campaign of intimidation and job discrimination caused Petitioner to suffer headaches, dizziness and gastrointestinal distress. (RT 534-536.) Petitioner had little desire to eat or drink and lost forty pounds during the period. (RT 538, 576.) Petitioner was hospitalized in April of 1967 for tests, but no organic cause was found for his symptoms, his doctor determining that the symptoms resulted from his employment problems and his conflict with Daley. (RT 535-538, 575-576, 1732, 1747-1758, 1763-1766.) Petitioner was unable to work and under a doctor's care from early April of 1967 until May, and again from later in May until December of 1967. (RT 538, 574-576, 616.)

Daley's attempts to drive or starve Petitioner out of Local 25 continued until mid-1968. As he had earlier warned Daley, Petitioner did run for the presidency of the Local in 1968 and campaigned actively against Daley when the latter sought re-election as Local business agent. (RT 669.) Petitioner was narrowly defeated, but Daley was also defeated and Petitioner's two-year ordeal came finally to an end. (RT 667-670.)

## B. Procedural Background

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On April 17, 1969, Petitioner filed this action for damages against the United Brotherhood of Carpenters and Joiners, against Local 25 and the District Council, and against Local Business Agent E. G. Daley and certain other officials of Local 25 in the Superior Court for the County of Los Angeles, California. The relevant pleading herein is Petitioner's First Amended Complaint, which contains four causes of action. The first cause of action substantially pleaded a breach of the union's duty of fair representation. The second pleaded intentional infliction of emotional distress. The third pleaded fraudulent misrepresentation. The fourth pleaded breach of contract. (CT 102-114; App 1 - 16.)<sup>6/</sup> The Defendants demurred to all causes of action (CT 127-128; App 16 - 18) and their demurrer was sustained as to the first, third and fourth causes of action, without leave to amend. (CT 190; App 19.) The basis of this ruling was that the subject matter of these causes of action was pre-empted by the Labor-Management Relations Act.

<sup>6/</sup>

For the sake of convenience, all references to the Single Appendix required by Rule 36 of the Rules of this Court will be made by means of the abbreviation "App" followed by the appropriate page number.



Petitioner's action went to trial on the single remaining cause of action for intentional infliction of emotional distress. (RT 1.) On February 5, 1973, pursuant to a jury verdict, judgment was rendered on that remaining cause of action against Daley, Local 25 and the District Council in the amount of \$7500 in compensatory damages and \$175,000 in punitive damages. (CT 570-572; App 67 - 69 .)<sup>7/</sup> All three appealed from the judgment (CT 645) and the Court of Appeal of the State of California, Second Appellate District, in a published opinion authored by Justice pro tempore Charles Loring, reversed. Although Respondents made a number of assignments of error, the sole basis for that reversal was that Petitioner's action was pre-empted by the Labor-Management Relations Act. (See Appendix A to Petition for Writ of Certiorari.)

A timely petition for hearing in the Supreme Court of the State of California was denied on September 10, 1975. (See Appendix B to Petition for Writ of Certiorari.)

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<sup>7/</sup> Judgment was never entered with respect to the other causes of action. Their present status is a matter of continuing dispute, but that fact does not affect this Petition.

## SUMMARY OF ARGUMENT

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Petitioner submits that the doctrine of pre-emption has been misapplied to this case, and that his substantial rights have been needlessly sacrificed in order to avoid an essentially imaginary conflict between federal labor law and California's law of torts.

It is uncertain to what extent the bulk of the misconduct on which this action is based is subject or arguably subject to the Labor-Management Relations Act and thus comes within the operation of the pre-emption principle announced in San Diego Building Trades Council v. Garmon, supra, 359 U.S. 236. To the extent that it is subject at all to federal labor relations law, the misconduct on one hand has only the slightest imaginable impact upon the process of employee self-organization and collective bargaining which the Labor-Management Relations Act was designed to promote. On the other hand, it vitally affects California's significant interest in the well-being of its citizens. For that reason, the misconduct falls within exceptions to the pre-emption principle recognized in International Association of Machinists v. Gonzales, 356 U.S. 617 (1958) and Linn v. Plant Guard Workers, 383 U.S. 53 (1966). Moreover, the misconduct clearly involves breaches of the union's duty to fairly represent each of its members and of the standards of fair discipline set forth in the Labor Management Reporting and Disclosure Act of 1959, and may

therefore be made the subject of an action at law even if it also incidentally violates the provisions of the Labor-Management Relations Act.

If the decision below in fact represents a correct application of the pre-emption doctrine as it now exists, Petitioner submits that serious reconsideration of that doctrine is in order. Indeed, the pre-emption doctrine as it has developed in the law of labor relations is unclear, uncertain in its application, and frequently productive of manifest injustices, and it is but poorly promotive of the purposes it is intended to serve. The instant action, if its subject matter is in fact pre-empted, illustrates as well as any case could the deficiencies of the pre-emption principle as it is now formulated. If this Court is moved by the obvious insufficiencies of the present rule to undertake a re-examination thereof, at least two alternative approaches are possible. On one hand, the Court might simply abandon the Garmon principle insofar as it presently applies to disputes between union members and their unions, thus reopening to the states a field which Congress never really meant to occupy when it enacted the Labor-Management Relations Act. On the other hand, Garmon might be abandoned in its totality and replaced with a different and less capricious principle. A principle far better adapted to the resolution of labor pre-emption issues, whether those issues arise in the context of ordinary labor disputes between employers and unions or in the context of member-union disputes is that suggested in this Court's decision in Teamsters Local 20 v. Morton, 377 U.S. 252

(1964). Under a Morton approach, if Congress focussed upon the conduct in question but in weighing the interests of the public, employers, individual workmen and organized labor, decided either to regulate that conduct or to leave it free of all regulation, a state could not itself regulate that conduct on the basis of its own reweighing of the same interests; however, if the conduct were not actually protected by federal law, a state might nonetheless legitimately reach it with laws of general applicability not intended to regulate labor relations as such. Under either approach, the law would be rendered substantially more just and reasonable in its operation and far simpler to administer.

## ARGUMENT

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### I. STATE REGULATION OF THE MISCONDUCT COMPLAINED OF HERE INVOLVES FEW OF THE RISKS WHICH THE PRE-EMPTION PRINCIPLE ANNOUNCED IN GARMON WAS DESIGNED TO AVOID

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#### A. The Extent of Federal Pre-emption of State Power to Deal With the Misconduct Complained of Herein Depends on the Nature and Extent of Congress' Objectives in Enacting the Labor-Management Relations Act

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##### 1. The Pre-emption Principle

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a. The doctrine of pre-emption as it is applied in the law of labor relations is in actuality a marriage of two separate but similar concepts.

(1) On one hand, the doctrine is an application of the traditional principle of

pre-emption. Congressional power over labor relations stems from the interstate commerce clause of the Constitution (U.S. Const. Art. 1 § 8; NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937)). The term pre-emption suggests federal displacement of state power over interstate commerce, and thus over labor relations, in one of two ways. First, as indicated in Cooley v. Board of Wardens 53 U.S. (12 How.) 299, 319-32 (1851) some aspects of interstate commerce are so demanding of uniform national regulation that their regulation must be by a single authority, and under the supremacy clause (U.S. Const. Art. 6) that authority can only be Congress. Second, where state authority is not pre-empted by the bare constitutional grant of power to Congress, state power may still be displaced by legislation which, through the supremacy clause, pre-empts some or all of the field. (See Note, Federal Pre-emption in Labor Relations 63 Nw. U.L. Rev. 128, 129-130 (1968).) Labor relations is not one of the aspects of interstate commerce deemed directly foreclosed to the states by the Constitution, and to the extent that state power is excluded from the field this is the result of Congress' enactment of national labor legislation. (Id.)

As this Court has several times observed (Motor Coach Employees v. Lockridge, 403 U.S. 274, 286 (1971); Linn v. Plant Guard Workers, *supra*, 383 U.S. 53, 58-59; International Association of Machinists v. Gonzales, *supra*,



356 U.S. 617, 619; Garner v. Teamsters Local 776, 346 U.S. 485, 488 (1954)) determination of Congressional intent as to the pre-emptive effect of the Labor-Management Relations Act is necessarily a matter of inference from the terms of the Act and the circumstances surrounding its enactment, since with one or two minor exceptions<sup>8/</sup> the Act contains no provisions directly addressing the pre-emption issue.

(2) On the other hand, the pre-emption doctrine as applied to labor relations law also embraces a principle of primary jurisdiction, the courts having reasoned that since under Section 10 of the Labor-Management Relations Act (29 U.S.C. § 160) the Labor Board alone is expressly vested with the authority to interpret and enforce the provisions of the Act, subject only to limited review by the courts, Congress intended to bar the exercise of concurrent jurisdiction over unfair labor practices by the courts. (Garner v. Teamsters Local 776, *supra*, 346 U.S. 485, 490-491; Bryson, A Matter of Wooden Logic: Labor Law Pre-emption and Individual Rights, 51 Tex. L. Rev. 1037, 1038-1039 (1973).) The principle of primary jurisdiction rests on a theoretical foundation similar to that of true pre-emption: To confer concurrent jurisdiction upon the courts risks fragmentation, inconsistency and conflict where a unitary policy is desirable or

<sup>8/</sup>

See Sections 14(b) and 14(c) (29 U.S.C. §§ 164(b) and 164(c)).

necessary. (See Garner v. Teamsters Local 776, *supra*, 346 U.S., at pp. 490-491; see also Cox, Labor Law Preemption Revisited, 85 Harv. L. Rev. 1337, 1341-1345 (1972).) This concept obviously precludes both state and federal courts from attempting to enforce the provisions of the Act. Moreover, because the supremacy clause has no effect upon competing schemes of federal law, the notion of primary jurisdiction or something quite like it, is evidently the basis upon which courts are precluded from applying other federal law to conduct which is subject to the Act, except of course where Congress cannot be said to have intended the Act to be the exclusive body of law applicable to the particular conduct involved. (See Boilermakers v. Hardeman, 401 U.S. 233, 237-241 (1971); Vaca v. Sipes, 386 U.S. 171, 176-183 (1967).)

Because the determinative consideration is the intent of Congress whichever notion is involved, Petitioner now turns to an examination of that intent.

2. Purpose and Scope of  
the Labor-Management  
Relations Act

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a. As originally enacted, the National Labor Relations Act of 1935 (49 Stat. 449, 29 U.S.C. §§ 151, et seq.) regulated the conduct of employers only and affected labor organizations only to the extent that they found shelter beneath its protective wing. In 1947, however, Congress enacted the Labor-Management Relations Act (61 Stat. 136, 29 U.S.C. §§ 141, et seq.), popularly known as the Taft-Hartley Act, in order for the first time to bring the conduct of the unions within the ambit of federal labor relations law.

The new provisions added by the Taft-Hartley legislation to regulate union conduct covered a number of subjects, but in keeping with Congress' declared purpose of establishing an orderly and nationally uniform process for employee self-organization and for the initiation and maintenance of collective bargaining between organized employees and their employers (29 U.S.C. §§ 141, 151) most of the new provisions clearly dealt (as did the employer provisions of the original National Labor Relations Act) with acts directly impinging on that process. Most of the new provisions concerned union conduct directed at employers. (See Sections 8(b)(1)(B); 8(b)(3); 8(b)(4)(A), (B), (C) and (D); 8(b)(6).) Only three -- Sections 8(b)(1)(A), 8(b)(2) and

8(b)(5) -- concerned union conduct aimed specifically at individuals. Of these only the first two are relevant here.

Section 8(b)(1)(A) made it an unfair labor practice for a labor organization or its agents to "restrain or coerce . . . employees in the exercise of the rights guaranteed in Section 7: Provided, That this paragraph shall not impair the right of the labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;..."

Section 8(b)(2) made it an unfair labor practice "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;..."

Because this case turns in large measure on the meaning and applicability of the two sections just quoted, an understanding of what Congress intended by the provisions is essential. Of particular concern is the extent to which Congress meant in enacting these provisions to go beyond its declared purpose and to regulate conduct essentially unrelated to employee self-organization and collective bargaining. This may be best determined by reference to the legislative history of the Taft-Hartley legislation

and to subsequent legislation enacted to reach matters which Congress recognized it had not covered in the original legislation.

b.) The Taft-Hartley legislation grew out of a groundswell of public indignation over what were felt to be flagrant abuses of the freedom from regulation which labor organizations enjoyed under the National Labor Relations Act. Among the abuses singled out by the critics of the National Labor Relations Act were union intimidation, coercion and even violence in persuading unorganized workers to join unions. Another issue which provoked heated debate was whether and to what extent workers who were not members of labor organizations should be protected in their efforts to obtain and hold jobs in heavily unionized industries. Not surprisingly these concerns figured prominently in the legislative proposals and Congressional debate from which the Labor-Management Relations Act ultimately emerged.

(1) Section 8(b)(1)(A) was Congress' specific response to organizational coercion. As is detailed in NLRB v. Drivers Local No. 639, 362 U.S. 274, 285-290 (1960), Section 8(b)(1)(A) was added to Senate Bill 1126 (which ultimately became the Labor-Management Relations Act) by amendment on the floor of the Senate after the bill was reported out of committee.<sup>9/</sup> (1 NLRB, Leg.

<sup>9/</sup>

The idea underlying Section 8(b)(1)(A) first appears in the legislative history in Senate Report No. 105 (Con't p. 23)

Hist. LMRA, pp. 1018-1033; 1139-1145, 1183, 1192-1209, 1216-1217.)

The debate and committee reports indicate that both proponents and opponents of the provision clearly understood that its primary target was the adverse effect of tactics of intimidation upon the organizational process. (1 NLRB, Leg. Hist. of LMRA, pp. 456, 546, 647, 891; 2 NLRB op cit., pp. 1018-1021, 1023-1027, 1029-1030, 1192-1209.) To the extent that Section 8(b)(1)(A) may be construed to apply to union coercion other than attempts to compel non-members to join a union -- that is, to coercion directed at workmen already belonging to the union -- the legislative history indicates that this construction either was not intended at all (see 2 NLRB, Leg. Hist. of LMRA, pp. 1200, 1202-1203, 1204-1205) or if intended, was at most a secondary or incidental construction not deemed particularly important to the achievement of Congress' main objective of protecting individual freedom of choice during organizational campaigns (see 2 NLRB, Leg. Hist. of LMRA, pp. 1028-1031; see also NLRB v. Allis Chalmers Mfg. Co., 388 U.S. 175, 179-195 (1967)). How

<sup>9/</sup> (con't)

on S. 1128, Supplemental Views of Senators' Taft, Ball, Donnell and Jenner. (1 NLRB, Leg. Hist. of LMRA, p. 456.) The report and the Senate debates indicate that this provision was among those proposed but rejected while S. 1126 still in committee. (2 NLRB, Leg. Hist. of LMRA, p. 1204.)



little concerned Congress was with union conduct toward workmen already organized is perhaps most clearly revealed by the addition to the original section of the proviso that the section "shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." The announced purpose of the proviso was to allay the fears of the opponents of the section that it might be used to reach what were called "internal union affairs," by which was meant matters customarily governed by internal union rules, such as membership qualifications, the organization and structure of the union, the nature of the relationship between union members and their union and the grounds and procedures for imposing discipline upon members.<sup>10/</sup> (2 Leg. Hist. of

<sup>10/</sup>

A number of decisions by this Court reflect the distinction Congress sought to draw between coercion directed at non-members and coercion practiced by a union upon its own members by way of internal discipline. Thus in NLRB v. Allis-Chalmers Mfg. Co., supra, 388 U.S. 175, this Court held union enforcement of a fine imposed upon a member for crossing a picket line did not constitute "coercion" within the meaning of Section 8(b)(1)(A) since Congress in enacting the section did not intend to regulate union discipline. (See also NLRB v. Boeing Co., 412 U.S. 67 (1973); Scofield v. NLRB, 394 U.S. 423 (1969).) On the other hand, attempted enforcement of fines imposed upon former union

(Con't p. 25)

LMRA, pp. 1138-1142; see also NLRB v. Allis-Chalmers Mfg. Co., supra, 388 U.S., at p. 182-183.)

(2) The legislative history of Section 8(b)(2) is somewhat less clear than that of Section 8(b)(1)(A), but it does reveal that Section 8(b)(2) was intended primarily as part of Taft-Hartley's resolution of the "union security" versus "right to work" controversy.

In order to insure the right of workers not belonging to a union to obtain employment in organized industries while recognizing the right of organized workers to demand at the same time a fair measure of support for their union from all who benefit from the union's efforts as bargaining agent, Taft-Hartley banned "closed shop" arrangements, under which an employer would hire only union members, but authorized "union shop" arrangements, whereby an

<sup>10/</sup> (con't)

members who quit the union and then crossed picket lines has been held coercion within the meaning of the section. (Booster Lodge 405, International Assn. of Machinists v. NLRB, 412 U.S. 84 (1973); NLRB v. Granite State Joint Board, 409 U.S. 213 (1972).)

As will be seen below (see Section II B 2, infra), this distinction parallels a distinction appearing in the common law of unincorporated associations developed in the state courts. Such state law provided far greater protections to union members subjected to mistreatment by their unions than it did to non-members.

employer could agree with a union to require any non-member hired by him to join the union, at least to the extent of paying dues, as a condition of continuing employment (§§ 8(a)(3)<sup>11/</sup> and 8(b)(2); 1 NLRB, Leg. Hist. of LMRA, pp. 411-413, 1420.)

<sup>11/</sup>

Section 8(a)(3) provides in pertinent part as follows: "It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this subchapter . . . shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, . . . : Provided further, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; . . ."

That portion of Section 8(b)(2) which most obviously bears upon closed shop arrangements is the first clause, the effect of which is to forbid union attempts to cause an employer to discriminate against an employee in regard to hire, tenure or any other terms or conditions of employment for the purpose of encouraging union membership, except to the extent that the discrimination is permitted by the union shop provisions of Section 8(a)(3). The legislative history suggest no purpose other than the obvious one of precluding a union from urging upon an employer a closed shop arrangement to which the employer could not agree without committing an unfair labor practice. (1 NLRB, Leg. Hist. of LMRA, pp. 411-413, 1010.)

The purpose of the second clause is less clear. On one hand, it is quite evidently intended to prevent what is ostensibly a union shop from being turned into a de facto closed shop through the union's systematic denial of membership to non-members hired by the employer or through systematic expulsion of such non-members, once admitted. The legislative history, including the remarks of Senator Taft, the sponsor of the Senate bill, suggests that this was in fact its main purpose. (1 NLRB, Leg. Hist. of LMRA, pp. 1010, 1040, 1096-1097, 1420-1421.)

On the other hand, in preventing a union from causing an employer to discharge a worker expelled from the union for anything but nonpayment



of dues, the section goes well beyond bare prohibition of the closed shop, as the opponents of the proposed legislation were quick to point out. (See 2 NLRB, Leg. Hist. of LMRA, pp. 1040, 1578.) That is, its effect ceases to be solely to provide non-members with equal access to the job market and becomes at least in part to preclude a union from causing an employer to impose upon a member the ultimate sanction -- expulsion from the bargaining unit as well as from the union -- whether for the best or worst of internal union reasons.

The legislative history does suggest that this second meaning was intended by Congress. The bill's proponents adverted at several points to cases in which members had been expelled and then fired from their jobs under closed shop agreements in reprisal for offending union leadership and stated that while the section would not prevent expulsion from the union, it would preclude discharge of the member from his job under even a permissible union shop arrangement. (2 NLRB, Leg. Hist. of LMRA, pp. 1010, 1094, 1096, 1141-1142, 1420, 1497, 1525.)

But it is noteworthy that all of the union abuses mentioned involved interference with existing job rights and none of the debate over the section focussed upon the possibility that the section might be construed to authorize the Board to police union conduct toward a member which fell short of causing actual discharge from a job which he already possessed. Specifically,

no one ever mentioned the possibility that the section might be applied to hiring hall discrimination practiced against a member and based upon his participation in internal union affairs. In light of the fact that the operation of the hiring hall was a matter of internal union rules for whose breach state law already provided the affected member a number of remedies (see Section II B 2, *infra*) and of the further fact that the bill's proponents so emphatically disclaimed any intention of regulating the relations between members and their unions, the silence of the legislative history leaves it open to question whether Congress in fact meant to give the Board this function, or if Congress did so intend, whether it regarded the function as a particularly significant aspect of the Board's overall responsibility.

c. How limited was Congress' concern with union conduct toward members is perhaps most clearly indicated by the provisions Congress did not enact rather than those it did enact. Included in the bill originally introduced in the House (H.R. 2030) were a number of provisions under which it would have been an unfair labor practice to impose initiation fees and dues or assessments in excess of amounts authorized by majority vote, to deny members the right to resign at any time from the organization, to compel participation in any insurance or benefit plan, to discipline any member for criticizing his union or any officer or for failing to support any candidate or proposition in a union election, to discipline or expel a member without an



opportunity to be heard or upon an improper ground, to fail to hold secret elections of union officers or to fail to submit to secret ballot issues of dues, assessments or strikes, to spy upon members or to threaten them or their families, or to fail to report union finances to members at least annually. (H.R. 3020, § 8(c), reproduced at 1 NLRB, Leg. Hist. of LMRA, pp. 344-345; see also p. 616.)

These provisions (which were referred to by H. R. 3020's sponsors and proponents as an employees' "Bill of Rights" (1 NLRB, Leg. Hist. of LMRA, pp. 322, 614-615, 639, 640) fell by the wayside in a manner which precludes any conclusive determination of Congress' reasons for abandoning them. The provisions survived the initial House deliberations and were part of the bill the House adopted and sent to the Senate. (1 NLRB, Leg. Hist. of LMRA, pp. 179-183, 863.) The provisions were never considered in the Senate, however, for just as the House bill reached the Senate, the Senate Committee on Labor and Public Welfare reported out its own bill. (1 NLRB, Leg. Hist. of LMRA, pp. 99-157; 2 NLRB, op. cit., pp. 1000-1001.) That bill contained no provisions equivalent to the mentioned provisions of the House bill, and since committee reports seldom dwell on matters not included in a bill, the Senate report is predictably silent as to why no such provisions are to be found in the Senate bill. There was little discussion in the course of the Senate's debate on the Senate bill of the issues raised by the provisions of the House bill here in question.

Ultimately, the Senate substituted the language of its own bill for that of the House bill (1 NLRB, Leg. Hist. of LMRA, p. 880; 2 NLRB, op. cit., pp. 1469-1470) and the House bill, as so modified, was adopted by the Senate. (2 NLRB, Leg. Hist. of LMRA, p. 1522.) The amended bill was approved essentially unchanged by the joint conferees. (1 NLRB, Leg. Hist. of LMRA, pp. 505 et seq.) The House conferees' report to the House makes no reference to the omitted provisions and the brief debate in the House prior to its adoption of the Senate's substitute measure is essentially silent with respect to them. (1 NLRB, Leg. Hist. of LMRA, pp. 505 et seq., 878-898.)

But if the record contains no direct expression of Congress' thinking on the omitted provisions, Congress' motives are nonetheless relatively clear. The House bill was regarded by some legislators as unnecessarily "punitive" (see, e.g., 1 NLRB, Leg. Hist. of LMRA, pp. 603-605, 864-865). There can be little question that the Senate bill was deliberately made less severe in order to draw as much support as possible to override an anticipated veto by President Truman, or that, the primary objective of controlling union conduct toward employers and unorganized workers having been achieved by the Senate bill, the House, with some reluctance but in apparent recognition of the difficulty of obtaining Senate agreement to the House provisions, not to mention sufficient votes for an override, simply left the internal union affairs at which the "Bill of Rights" was clearly directed for future legislation. (See 1 NLRB, Leg. Hist.

of LMRA, pp. 871-898.)

d. Another indication of what Congress intended when it enacted the Labor-Management Relations Act may be found in Congress' subsequent enactment of the Labor Management Reporting and Disclosure Act of 1959 (73 Stat. 519; 229 U.S.C. 401 et seq.), commonly referred to as the Landrum-Griffin Act.

The result of a series of hearings into union racketeering and corruption before the Senate Select Committee on Improper Activities in the Labor or Management Field (known popularly as the McClellan Committee) the Landrum-Griffin Act established requirement of periodic reports by unions of union finances and internal affairs and by employers engaging in labor related activities (Title II), set severe limits on union use of trusteeships in controlling the affairs of locals (Title III), imposed stringent regulations on the union election process (Title IV), and imposed fiduciary obligations upon union officials with respect to the fiscal management of unions (Title V). (See generally, Aaron, The Labor Management Reporting and Disclosure Act of 1959, 73 Harv. L. Rev. 851 (1960); Cox, Internal Affairs of Labor Unions Under the Labor Reform Act of 1959, 58 Mich.L.Rev. 819 (1960).)

Recognizing that "it was imperative that all union members be guaranteed at least 'minimum standards of democratic process . . .'" (Hall v. Cole, 412 U.S. 1, 7 (1973)) Congress also included as Title I of the Act a "Bill of Rights of Members

of Labor Organizations." Section 101 of Title I (27 U.S.C. § 411) guaranteed union members the equal right to full participation in their unions' internal political processes (Section 101(a)(1)), freedom of speech and assembly (Section 101(a)(2)), protection against arbitrary dues increases (Section 101(a)(3)), protection of the right to file lawsuits against the union or to testify in legislative, administrative or judicial proceedings (Section 101(a)(4)), and procedural due process in the imposition of union discipline (Section 101(a)(5)). Section 102 of Title I allowed any person whose rights "have been infringed by any violation of this Title [to] bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate." (29 U.S.C. § 412(a).) A closely related provision appeared in Title VI of the Act. Section 609 made it unlawful for any labor organization or agent, employee or representative thereof "to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this Act" and specifically made Section 102 applicable to any such conduct. The meaning and application of these provisions will receive further treatment below, but what is significant here is that the provisions of the "Bill of Rights" closely resemble the provisions originally included in H.R. 3020 but not enacted as part of the Labor-Management Relations Act, and that the Labor-Management Relations Act only tangentially covered or did not cover at all the conduct which Congress ultimately reached in adopting Title I.



### 3. Early Labor Pre-emption Decisions

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Proceeding on a case-by-case basis and describing its efforts as a "process of litigating elucidation" (International Association of Machinists v. Gonzales, *supra*, 356 U.S. 617, 619) this Court in its early pre-emption decisions frequently undertook a careful examination of the respective purposes and effects of federal labor relations law and of the rules of state law asserted to be in conflict therewith, and revealed a willingness to accommodate federal interests to local interests. These decisions recognized the interest of the states in regulating some conduct which was neither protected nor prohibited by federal labor relations law (see United Automobile Workers v. Wisconsin Employment Relations Board, 336 U.S. 245 (1949); Allen-Bradley Local v. Wisconsin Employment Relations Board, 315 U.S. 740 (1942)) and, indeed, even some conduct actually regulated by federal law, where the conduct was prohibited by federal law and the remedies under state law were different from federal remedies (United Construction Workers v. Laburnum Construction Corp., 347 U.S. 656 (1954)). The Court also recognized the right of individuals to seek judicial redress for harms resulting from conduct which, although occurring in an industrial setting, lay outside the Labor Board's primary area of responsibility and for which federal law provided inadequate

remedies (International Association of Machinists v. Gonzales, *supra*, 356 U.S. 516; United Auto Workers v. Russell, 356 U.S. 634 (1958)). The Court seemed more inclined to bar state intervention when a local tribunal sought to apply a rule of state law intended specifically to regulate labor relations as such, even if the local rule was similar or identical to a rule of federal labor law and even if the Board had declined to exercise jurisdiction over the dispute in question. (See Guss v. Utah Labor Relations Board, 353 U.S. 1 (1957); Garner v. Teamsters Local 776, *supra*, 346 U.S. 485; Bethlehem Steel Co. v. New York Labor Relations Board, 330 U.S. 767 (1947).) Predictably, when state law, whether applicable generally or whether intended specifically to regulate labor relations, attempted to prohibit or burden conduct which Congress had wished to protect, the invariable conclusion was that such law invaded a field from which all local authority had been excluded. (Teamsters Union v. Oliver, 388 U.S. 283 (1959); Bus Employees v. Wisconsin Board, 340 U.S. 383 (1951); United Automobile Workers v. O'Brien, 339 U.S. 454 (1950); Hill v. Florida, 325 U.S. 538 (1945).) The same conclusion, perhaps less predictably, was reached in some cases where the conduct might be either protected or prohibited, the Court professing an unwillingness to make a judgment it believed should be made by the Board. (Teamsters Union v. New York etc. Railroad Co.,



350 U.S. 155 (1956); Weber v. Anheuser-Busch, Inc., 348 U.S. 468 (1955).)

#### 4. The Garmon Principle

Precisely because they were the product of an ad hoc process, the early decisions failed to produce a single, simple and universally applicable pre-emption test, and ultimately, in San Diego Building Trades Council v. Garmon, supra, 359 U.S. 236, this Court abandoned the case-by-case approach and announced a more sweeping formulation of the pre-emption doctrine. While advertent in very general terms to the dangers against which the principles of pre-emption and primary jurisdiction are intended to protect the federal scheme of labor relation law, the Garmon Court focussed not at all upon the extent to which those dangers might be present in the case before it. The Court's express concern was instead "classes of situations" and "areas of potential conflict" (359 U.S. at p. 242). With that concern in mind, the Court fashioned a general rule which could be applied by the lower courts in all cases without weighing conflicting policy considerations, the Court's evident intent being to enable the lower courts to police the uneasy frontiers between federal and state power and between administrative and judicial jurisdiction, without the need for constant supervision by this Court. (See Motor Coach Employees v. Lockridge, supra, 403 U.S. 274, 289-290.)

The Garmon test is simply stated. Under that test, conduct actually or arguably subject to the Labor-Management Relations Act -- that is, actually or arguably prohibited by Section 8 or actually or arguably protected by Section 7 -- may not be regulated by the states and lies within the exclusive jurisdiction of the Labor Board (359 U.S. at p. 244.) Theoretically at least, the application of the test is simple, too. What determines whether a particular lawsuit is pre-empted under the Garmon principle is not the form of the action -- that is, whether it sounds in tort or in contract or whether it purports to depend on state law of general applicability instead of state law which attempts specifically to regulate labor relations -- but rather the nature of the conduct itself. If the "crux" of the lawsuit is conduct arguably regulated by the Labor-Management Relations Act and subject to the Board's jurisdiction, the courts are without power to entertain it. (Plumbers Union v. Borden, 373 U.S. 690, 697-698 (1963).)

Garmon involved application by a state of local labor relations law to award an employer damages for peaceful organizational or recognition picketing by the defendant labor organization, conduct which was in all probability lawful under then existing federal law (see NLRB v. Drivers Local 639, supra, 362 U.S. 274) but which the state court unaccountably found was prohibited under Section 8(b)(2). This Court, applying the test set out above, reversed the judgment. As pointed out by Mr. Justice Harlan in his concurring opinion in Garmon, the same

result would have followed had the Court applied the established principle that state prohibition of federally protected conduct is clearly impermissible under the supremacy clause. (359 U.S. at pp. 249, et seq.; see also Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); Cox, Labor Law Preemption Revisited, supra, 85 Harv. L. Rev. 1337, 1341.

Garmon was thus an easy case, and the new principle, at least as applied to Garmon's facts, produced an unquestionably proper result. Whether in other essentially dissimilar contexts it does the same is explored in the sections which follow.

B. There Is No Significant Conflict Between the Objectives of the Labor-Management Relations Act and California's Law of Torts.

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To the extent that this case may come within the literal terms of the Garmon principle, it does so in a way which involves the dangers contemplated by Garmon in the most indirect sense possible.

1. Preliminary Considerations

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Some preliminary observations are in order before turning to Garmon and its applicability hereto.

In the first place, this case is unlike the usual action against a union by a member in that the misconduct complained of was not a single act but rather embraced a series of acts of varying character occurring over a period of more than two years. This fact makes it somewhat more difficult to determine where the "crux" of the action lies than in the previous cases decided by this Court under the Garmon principle, but logically, the "crux" of the action should be determined by examination of the overall character of the misconduct, rather than by fixing

upon isolated instances of misconduct. Moreover the Act proscribes only that conduct whose real motive or true purpose is related to union considerations and then only to the extent that Congress actually focussed upon that conduct as inimical to the process of employee self-organization and collective bargaining. (NLRB v. Allis-Chalmers Mfg. Co., supra, 388 U.S. 175, 184-195; American Ship Building Co. v. NLRB, 380 U.S. 300, 311 (1965); Local 357, International Brotherhood of Teamsters v. NLRB, 365 U.S. 667, 675-676 (1961); NLRB v. Drivers Local Union No. 639, supra, 362 U.S. 274, 284-290; Radio Officers v. NLRB, 347 U.S. 17, 42-43 (1954).) For that reason, whether the conduct which forms the "crux" of the action is within the scope of the Act depends both upon Congress' actual intent when it enacted a provision which might seem to extend to such conduct and, if Congress meant to reach such conduct, upon the motivation underlying the conduct.

In the second place, Petitioner has not sought judicial interpretation or application of the provisions of the Labor-Management Relations Act, so that the Labor Board's role as the primary arbiter of national labor policy is not directly involved here. Nor has Petitioner invoked a rule of state law aimed specifically at the regulation of labor relations, so that the problem of competing schemes of labor relations law is not involved here either. (See Hardeman v. Boiler-makers, supra, 401 U.S. 233, 240-241.) The conflict here, to the extent there is one, is between a local rule of tort law which applies generally and which does not purport to regulate

union misconduct as such, and a scheme of federal law narrowly focussed upon the process of employee self-organization and collective bargaining.

## 2. Application of Garmon

It would appear as a matter of simple common sense that the chances of any substantial conflict between federal labor policy as declared by the Act and enforced by the Labor Board and California's policy of protecting its citizens from the intentional infliction of grievous mental distress should be slight indeed. This common sense conclusion receives substantial support from a careful analysis of the Garmon principle as it applies to the facts of this case.

a. To begin with, it is clear beyond cavil that the misconduct herein was not protected under Section 7 of the Labor-Management Relations Act. At no stage of this litigation have the Respondents suggested it was even arguably protected, nor have they cited any authority which would in any way support that position.

(1) If the union's conduct were clearly protected -- that is, if on the basis of undisputed facts and clear precedent reasonable men could not differ as to its protected character -- there would, of course exist an immediate and direct conflict between the standards of



behavior prescribed by the Act and applied by the Board and the standards of behavior prescribed by California's law of torts and applied by California's courts. To countenance any such conflict in standards of behavior would unquestionably frustrate implementation of the national labor policy, in violation of the supremacy clause. Moreover, where state law purported to regulate labor relations as such (a consideration which, as already indicated, is not involved here) to permit such a conflict would result in Balkanization of the law of labor relations, in derogation of the uniformity of regulation apparently envisaged by Congress.

(2) Even if the conduct were only arguably protected, there would still theoretically exist the possibility of a direct conflict in substantive standards of behavior of the sort just described if the states sought to prohibit or control that conduct. And, even though the state legislatures and the courts were to take the trouble to satisfy themselves that the conduct was not actually protected before enacting or enforcing state laws regulating it, they would in a sense invade the Board's role as primary interpreter of the Act in so determining.

Nonetheless, as Justices Douglas and White pointed out in their dissenting opinions in Motor Coach Employees v. Lockridge, supra, 403 U.S. 305, 331 et seq., when a court declines to decide whether conduct is actually protected and dismisses an action because it might be protected the controversy is placed in a state of juridical

limbo, since there is no way the plaintiff can obtain a declaratory ruling from the Board indicating whether the conduct is or is not protected. (See also the concurring opinion of Mr. Justice White in Longshoremen v. Ariadne Shipping Co., 317 U.S. 195 at p. 201 (1970); Lesnick, Pre-emption Reconsidered: The Apparent Reaffirmation of Garmon, 72 Col. L. Rev. 469, 473 (1972).) In the face of the manifest injustice of denying an aggrieved party any determination of his claim, the mere risk of an incorrect assessment of what the Board would say if the question could be put to the Board at all may well be regarded as relatively insignificant. (See Cox, Labor Law Pre-emption Revisited, supra, 85 Harv. L. Rev. 1337 at p. 1342.)

b. It being obvious that Respondents' conduct was neither actually nor arguably protected under Section 7, the Garmon rule, to the extent that it applies at all, must apply because their conduct violated or arguably violated Section 8(b) of the Act.

(1) If conduct clearly violates Section 8 -- that is, if it is conduct as to whose prohibited character no reasonable disagreement is possible -- to allow the states to forbid it or regulate it cannot result in the direct conflict between inconsistent standards of behavior which renders impermissible state prohibition of protected conduct. The conflict in such situations is nothing more than a difference in remedies available from the respective tribunals.

How serious is this difference in remedies depends on several factors. Professor Archibald Cox has argued that Congress' specification of limited administrative remedies for all but a few unfair labor practices (see §§ 10(b) and 303 of the Labor-Management Relations Act (29 U.S.C. §§ 160(b) and 187)) implies rejection of other remedies for such conduct and a policy determination that administrative remedies are more suited than the usual legal remedies to the sensitive problems of union-employer relations. Professor Cox suggests that if employers and unions may obtain different and by hypothesis stronger remedies from the courts, at least where such remedies are provided by state laws regulating labor relations as such, the delicate balance which federal labor policy has struck between the interests of employers and those of unions will be disturbed. (Cox, Labor Law Preemption Revisited, supra, 85 Harv. L. Rev. 1337, 1343; see also Lesnick, Preemption Reconsidered: The Apparent Reaffirmation of Garmon, supra, 72 Col. L. Rev. 469, 475-476; Garner v. Teamsters Local 776, supra, 346 U.S. 485, at pp. 498-500.)

Professor Cox' analysis has clear and undeniable merit, because if lawsuits and legal remedies come to replace administrative procedures and remedies in ordinary labor disputes, the nature of the process Congress institutionalized in enacting the national labor legislation will be greatly altered and the balance of power between

union and employer possibly upset.<sup>12/</sup>

This analysis is inapplicable to member-union suits. Actions by members against their unions can hardly affect to any appreciable extent the process Congress established to regulate the conduct of unions and employers toward each other, since the main combatants will still be relegated to the same economic weaponry and narrow administrative remedies, and the ability of either to carry on the battle will remain unimpaired. It is to be noted that both Congress and the courts have found the likelihood of any adverse impact upon the federal scheme of labor relations law slight in this limited area. This is evidenced not only by their creation of exceptions to the pre-emption doctrine for member suits founded on a union's breach of its duty of

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Differences between state and Board remedies transcend the form of the relief given. One further difference is timing, it being usually quicker to obtain a state temporary restraining order than to await the Regional Director's application for an injunction under Section 10(1) (29 U.S.C. §160(1)). Another is control over the litigation. Decisions about whether to initiate litigation at all and what course it shall take may well differ depending on whether a party to the dispute or the Regional Director is making them. (See Cox, Labor Law Preemption Revisited, supra, 85 Harv. L. Rev. at pp. 1342-1343.)

fair representation or upon improper union discipline but by the fact that both compensatory damages (including damages for mental suffering) and punitive damages have been allowed under both of these exceptions, even for conduct which clearly constitutes a clear unfair labor practice. (See Sections II C 1 and II C 2, infra.)

Moreover, considering the question from a common sense point of view, the effect upon the federal scheme when a court awards an individual compensatory or even punitive damages for union misconduct which both the Labor-Management Relations Act and state law of general application concur in prohibiting is far more likely to be favorable than otherwise. The central objective of the Act's remedial provisions is obviously to halt unfair labor practices and to prevent their recurrence. This is accomplished primarily by cease and desist orders and to some extent by any awards of back pay which may be made to individual workers harmed by the unfair labor practices. (See § 10(c).) Awards by courts of compensatory damages have a deterrent effect essentially equivalent to that of back pay awards. In purpose and effect, awards of punitive damages more nearly parallel cease and desist orders. If perhaps more drastic, such awards are also more effective; the threat of such an award will tend to a greater extent than a threat of a cease and desist order to prevent misconduct in the first place and, once imposed, such an award will operate, no less than a cease and desist order, as a deterrent to like conduct

in the future.<sup>13/</sup>

(2) An element of complication is added if the conduct is only arguably prohibited by Section 8. The evident intent of the "arguably prohibited" portion of the Garmon test is (1) to leave to the Labor Board, with its special expertise, the power to determine whether certain borderline varieties of conduct are helpful or harmful to the objectives of the Act and thus whether they should be prohibited or not, and (2) to allow the Board in effect to protect or permit such conduct by simply not regulating it.<sup>14/</sup> When conduct is arguably subject to Section 8 in this sense, there exists a chance that as diligently as a court may try to imitate the Board's reasoning on labor issues, the court will reach a conclusion different from the Board's and will mistakenly prohibit conduct which the Board, in its wisdom, would have left untouched. (See Lesnick, Preemption Reconsidered: The Apparent Reaffirmation of Garmon, supra, 72 Col.L.Rev. 469, 477-478.) Thus the reasons underlying this portion of the Garmon test essentially parallel those underlying the "arguably protected" portion of the test.

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The subject of legal remedies will receive further treatment below. (See Sections II C 1 and II C 2, infra.)

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As to "permitted" conduct, see Section I B 2 d, infra.



(3) But there is some conduct which may be arguably prohibited by Section 8 without there being any shadow of a doubt that if it is in fact not prohibited by the Act, it is still inimical to the Act's objectives and would be proscribed by the Board if it thought it had the power. The issue in cases of this sort is whether Section 8 gives the Board the authority to act at all, not whether (assuming the Board does have such authority) it would regard the conduct as protected or permitted instead of prohibited. There may occur a slight risk of the kind of divergent remedies discussed above in connection with clearly prohibited conduct when a court awards a member damages for union misconduct which the Board might well prohibit but for doubts about its own authority to reach the conduct at all. But the bare risk of divergent remedies constitutes an even less direct interference with the effectuation of federal labor policy than occurs when conduct which is clearly prohibited under Section 8 is the subject of an award of legal remedies by a court of law. This risk can hardly be deemed significant when compared with the possibility that the aggrieved party will be left altogether without a forum if a court declines to decide a controversy which the Board would very possibly regard as outside its authority. (See dissent of Mr. Justice Douglas in Motor Coach Employees v. Lockridge, supra, 403 U.S. at pp. 304-305.)

c. It should be obvious into which of the above categories of clearly or arguably prohibited conduct the misconduct herein falls. The record reveals one instance of conduct for which the Board did provide at least a partial remedy, in the form of back pay from a single job to which

Petitioner had been improperly denied a referral. Inasmuch as the Board has spoken on that conduct, it would appear to fall within the category of clearly prohibited conduct. To the extent that the remainder of the conduct took the form of referral discrimination and indisputably proceeded from a desire to inflict retribution upon Petitioner for his political opposition to Daley, that conduct also came within a line of Board decisions declaring it a violation of both Section 8(b)(1)(A) and Section 8(b)(2). (See e.g., Plumbers Local Union No. 137, 207 NLRB 359 (1973); Carpenters Local Union No. 22, United Brotherhood of Carpenters and Joiners, 195 NLRB 1 (1972); Hoisting and Portable Engineers Local 4, 189 NLRB 366 (1971); United Bhd. of Carpenters and Joiners, Local 1281, 152 NLRB 629 (1965).)

It is nonetheless significant with respect to the above portion of the subject misconduct that even though the Board has interpreted the Act as authorizing it to reach that conduct, and even though the bare language of the Act might provide some support for the Board's position, the legislative history does not. As the Court remarked in NLRB v. Allis-Chalmers Mfg. Co., supra, 388 U.S. 175, 179, labor legislation is peculiarly the product of legislative compromise of strongly held views and the Board risks error in disregarding the legislative history merely because a provision may seem even unambiguously to embrace conduct before it. It has been demonstrated above that Section 8(b)(1)(A) was intended by Congress specifically to regulate organizational coercion and not other forms of coercion, such

as coercion directed at members because of their participation in internal union affairs. (See Section I A 1 a, supra.) Moreover, Section 8(b)(2) was aimed essentially at the closed shop, and to the extent that its terms seemed to go beyond prohibition of the closed shop, its proponents indicated only that the section was intended to reach union attempts to cause termination of an expelled member from a job he already possessed. (Section I A 1 b, supra.) The result is that the conduct in question rather closely resembles conduct which is arguably prohibited in the second of the two senses discussed above. That is, it lies at the outermost periphery of the category of conduct the Board was empowered to prohibit and perhaps wholly outside the Board's authority.

It should be clear, moreover, that much of the misconduct, and perhaps the greater part of it, could hardly have been in mere reprisal for Petitioner's political opposition to Daley. Petitioner has found no case involving such a protracted and intensive campaign of mistreatment directed by a union official at a member. The conclusion which inescapably follows from both the duration of the misconduct and its vengeful character (the conduct, it will be recalled, encompassed not only job discrimination but a steady barrage of insults, threats and vituperation and at least one minor battery) is that even though the misconduct may have been triggered in the first instance by Petitioner's opposition to Daley, its primary motivation soon transcended intraunion politics and became personal hatred and spite, indulged in for their own sake. So

viewed, this portion of the conduct thus either fell outside Section 8 or was arguably prohibited only in the limited sense that although by no means protected or permitted by the Act, the conduct might lie within the Board's prohibitory power.

d. It should be added that just as the conduct in question is obviously not the kind of conduct to which Sections 7 and 8 are primarily addressed, so it is not the kind of conduct involved in Teamsters Local 20 v. Morton, supra, 377 U.S. 242. There this Court recognized that conduct clearly not subject to the Act might still lie outside the regulatory power of the states if Congress, in deliberating upon the Act, necessarily focussed on the conduct but, in balancing the interests of employers, employees, unions and the public, decided to leave it unregulated by other state or federal law and subject to redress only through the victim's counter-use of his own economic weapons. Professor Cox denominates such conduct "permitted conduct" to differentiate it from conduct which the Board has the affirmative power to protect. (Cox, Labor Law Preemption Revisited, supra, 85 Harv. L.Rev. 1337, 1346; see also Lesnick, Preemption Reconsidered: The Apparent Reaffirmation of Garmon, supra, 72 Col.L.Rev. 469, 477-478.) It can hardly be contended that Congress, if it focussed at all on the kind of egregious misconduct involved here, could have intended that that misconduct be subject to redress only by resort to such countervailing power as an individual worker might be able to bring to bear upon his union. (See dissent of Mr. Justice Douglas in Plumbers Union v. Borden, supra, 373 U.S. 690, at p. 700.)



II TO THE EXTENT THAT THIS  
CASE COMES WITHIN THE  
GARMON PRINCIPLE, IT ALSO  
COMES WITHIN ONE OR MORE  
RECOGNIZED EXCEPTIONS TO  
GARMON

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A. Congress and the Courts  
Have Created a Number  
of Significant Exceptions  
to the Garmon Principle

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The Garmon principle is so honeycombed  
with exceptions that its true scope can be under-  
stood only by reference to those exceptions.

So far as it is relevant here, exceptions to  
the basic Garmon principle are recognized (1)  
where the conduct in question directly affects  
vital local interests traditionally left to state  
regulation or is only peripherally related to the  
central purposes of the Labor-Management Rela-  
tions Act (Linn v. Plant Guard Workers, *supra*,  
383 U.S. 53; Automobile Workers v. Russell,  
*supra*, 356 U.S. 634; International Association  
of Machinists v. Gonzales, *supra*, 356 U.S. 617;  
United Construction Workers v. Laburnum Con-  
structors Corp., *supra*, 347 U.S. 656); (2) where  
an employer or union has breached its duties to  
a worker arising from or concerning a labor

agreement (29 U.S.C. § 185; Smith v. Evening  
News Association, 371 U.S. 195 (1962); Buzzard  
v. Local Lodge 1040, International Assn. of  
Machinists, 480 F.2d 35 (9th Cir., 1973)); (3)  
where, without respect to any breach of a labor  
agreement, a union has violated its duty to fairly  
represent its members (Vaca v. Sipes, *supra*,  
386 U.S. 171; Smith v. Sheet Metal Workers Local  
25, 500 F. 741 (5th Cir. 1974)); and (4) where a  
union member has been subjected to union disci-  
pline in violation of the provisions of the Landrum-  
Griffin Act (29 U.S.C. §§ 411(a)(5), 412, 429;  
Hardeman v. Boilermakers, *supra*, 401 U.S.  
233). In these situations an action at law  
may be brought in a state or federal court even  
though the conduct in question is actually or  
arguably subject to the provisions of the Labor-  
Management Relations Act and to the jurisdiction  
of the Labor Board. <sup>15/</sup>

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<sup>15/</sup>

Other exceptions to Garmon are recognized in  
the following situations: (1) where a union has  
violated Section 8(b)(4)'s prohibition against  
secondary boycotts, in which case the affected  
employer may sue under Section 303 of the Labor-  
Management Relations Act (29 U.S.C. § 187) for  
any damages sustained; (2) where a union has  
obtained an agency or union shop agreement in vio-  
lation of a state law enacted under Section 14(b)  
of the Act, in which case a state court can enter-  
tain a suit to void the agreement (Retail Clerks  
v. Schermerhorn, 375 U.S. 96 (1963)); (3) where  
a dispute involves a company whose impact upon

(con't p. 54)



B. This Case is Squarely Within  
the Exception for Matters of  
Only Peripheral Federal Con-  
cern but Vital Local Concern

In Garmon itself this Court specifically  
exempted from the operation of the pre-emption

15/ (con't)

interstate commerce falls below the Board's juris-  
dictional standards, in which case under Section

14(c) of the Act a local agency or court may assert  
jurisdiction (Radio & Television Technicians v.  
Broadcast Services of Mobil, Inc., 380 U.S. 255

(1965)); (4) where employer or union conduct vio-  
lates Title VII of the Civil Rights Act of 1964

(42 U.S.C. §§ 2000e-5, 2000e-6); (5) where the  
dispute is subject to arbitration under a collective  
bargaining agreement, in which case an action  
under Section 301 will lie to compel arbitration and  
the Board will decline jurisdiction until the arbi-  
trator has rendered his decision, even then defer-  
ring to the arbitrator's decision unless it is clearly  
wrong (see concurring opinion of Mr. Justice White  
in Motor Coach Employees v. Lockridge, *supra*,

403 U.S., at pp. 310-313; Hooton, The Exceptional  
Garmon Doctrine, 26 Lab.L.J. 49, 54-57); (6)

where the dispute involves a foreign-flag ship in  
an American harbor, in which case state courts  
are sometimes permitted to assume jurisdiction  
(Hooton, *op. cit.*, at p. 61); and (7) where the  
conduct violates federal antitrust law, in which  
case the courts have jurisdiction notwithstanding  
the fact that it also amounts to an unfair labor  
practice (Connell Construction Co. v. Plumbers  
Local 100, 421 U.S. 616 (1975)).

principle state regulation of activity of vital local  
concern and only peripherally involving basic  
purposes of the national labor legislation. The  
Garmon court expressed this exception as follows:

"...When the exercise of state power  
over a particular area of activity  
threatened interference with the clearly  
indicated policy of industrial relations,  
it has been judicially necessary to pre-  
clude the State from acting. However,  
due regard for the presuppositions of  
our embracing federal system, includ-  
ing the principle of diffusion of power  
not as matter of doctrinaire localism  
but as a promoter of democracy, has  
required us not to find withdrawal from  
the States of power to regulate where  
the activity regulated was a merely  
peripheral concern of the Labor-Man-  
agement Relations Act. See Inter-  
national Assn. of Machinists v.  
Gonzales, 356 U.S. 617. Or where  
the regulated conduct touched interests  
so deeply rooted in local feeling and  
responsibility that, in the absence of  
compelling congressional direction, we  
could not infer that Congress had de-  
prived the State of the power to act."  
(359 U.S. 243-244.)

1. Linn v. Plant Guard  
Workers

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a. The primary application of the above described exception has been to situations involving actual or threatened public disorder (see United Auto Workers v. Russell, supra, 356 U.S. 634; United Construction Workers v. Laburnum Const. Corp., supra, 347 U.S. 659) to disputes characterized as involving internal union affairs (see International Association of Machinists v. Gonzales, supra, 356 U.S. 617) and to actions for libel (see Linn v. Plant Guard Workers, supra, 383 U.S. 53) but there is nothing in the cases which suggests that these were ever meant to be the only matters encompassed within the exception.

Indeed, much of this Court's discussion in Linn carries beyond mere defamation, as has been noted in several cases. (See concurring opinion of Chief Justice Burger in Taggart v. Weinacker's Inc., 397 U.S. 223, 228 (1971) [indicating Linn's applicability to civil trespass actions]; Sears, Roebuck & Co. v. San Diego Council of Carpenters, 52 Cal. App. 3d 690, 125 Cal. Rptr. 245 (1975) (hg. granted December 29, 1975, by California Supreme Court; argued April 5, 1976 [civil trespass]; Breitegger v. Columbia Broadcasting System, 43 Cal. App. 3d 283, 117 Cal. Rptr. 699 (1974) [wrongful interference with advantageous business relations]; Sheetmetal Workers v. Carter, 133 Ga. App. 872, 212 S.E. 645 (1975) [common law tort of conspiracy to deprive plaintiff of employment and to subject him to scorn and ridicule

among friends, associates and fellow employees].)

Linn suggests the following four-part test of general applicability to causes of action arising under state tort law: If (a) the conduct in question does not ipso facto constitute an unfair labor practice (383 U.S., at p. 63); if (b) the conduct affects compelling local interests (383 U.S., at pp. 63-64); if (c) the National Labor Relations Board and the courts are concerned with separate and severable consequences of the conduct and the remedies they provide are mutually exclusive (383 U.S., at pp. 63-64); and if (d) the conduct in question was reckless or intentional, as opposed to merely negligent, and caused actual damage (383 U.S., at pp. 64-66), a tort action may be brought under state law, notwithstanding an incidental violation of the Labor Management Relations Act.

b. The four-part test just described is more than satisfied here.

(1) In the first place, the bulk of the conduct involved here is not automatically an unfair labor practice. In fact, much of it is obviously not, only a small part of it (if any) is a clear unfair labor practice and the remainder may or may not amount to an unfair labor practice, depending upon the view taken of its primary motivation. (See Section I B 2 c, supra.)

(2) Secondly, the law of the state of California evidences a compelling local interest in the protection of California citizens from the intentional infliction of emotional distress. California law on this subject has two branches.



On one hand, California has long recognized the right to recover damages for the intentional and unreasonable infliction of mental distress which results in foreseeable physical injury to another. (Alcorn v. Anbro Engineering, Inc., 2 Cal. 3d 493, 497, 86 Cal. Rptr. 88, 468 P.2d 216 (1970); State Rubbish, etc., Assn. v. Siliznoff, 38 Cal. 2d 330, 337, 240 P.2d 282 (1952); Vargas v. Ruggiero, 197 Cal. App.2d 709, 717-718, 17 Cal. Rptr. 568 (1962); Richardson v. Pridmore, 97 Cal. App.2d 124, 130, 217 P.2d 113 (1950); Bowden v. Spiegel, Inc., 96 Cal. App.2d 793, 794-795, 216 P.2d 571 (1950); Emden v. Vitz, 88 Cal. App.2d 313, 316-319; 198 P.2d 696 (1948); see Rest. 2d Torts, § 312.) On the other hand, the courts of California have also acknowledged the right to recover damages for severe emotional distress alone, without consequent physical injury, in cases involving extreme and outrageous intentional invasions of the victim's mental and emotional tranquility. (State Rubbish, Etc., Assn. v. Siliznoff, *supra*, 38 Cal. 2d 330, 337, 240 P.2d 282; Cornblith v. First Maintenance Supply Co., 268 Cal. App.2d 564, 565, 74 Cal. Rptr. 216 (1968); Agostini v. Strycula, 231 Cal. App.2d 804, 808, 42 Cal. Rptr. 314 (1965); Perati v. Atkinson, 213 Cal. App.2d 472, 474, 28 Cal. Rptr. 898 (1963); see Rest. 2d Torts, § 46.) To qualify as outrageous, conduct must go so far beyond mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities that it can only be regarded as atrocious and utterly intolerable in a civilized community. (Alcorn v. Anbro Engineering, Int., *supra*, 2 Cal. 3d at p. 499, footnote 5, 85 Cal.

Rptr. 88, 468 P.2d 216; Rest. 2d, Torts, § 46, comment d.)<sup>16/</sup>

<sup>16/</sup>

The California decision of greatest significance here is Alcorn v. Anbro Engineering, Inc., *supra*. There, the plaintiff, who was a black employee of the defendant employer and a union shop steward, was fired for attempting to police the collective bargaining agreement and was subjected to ugly racial epithets in the process. The trial court sustained a demurrer to the plaintiff's action for damages based on allegations that the epithets had been used with the actual and malicious intent to cause, and that they had caused, severe emotional distress. In its strongest statement to date on the right of individuals in California to be free of such inexcusable invasions of their peace of mind, the California Supreme Court held that a cause of action had indeed been stated. Although the pre-emption issue seems not to have been raised in Alcorn, the case does unequivocally express California's intent to

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Doubtless the injury proved by Petitioner in this case would constitute an actionable wrong under either branch of the doctrine, since Petitioner did suffer nausea and gastrointestinal distress which actually required his hospitalization. (CT 534-537; App 43 - 46.) But Petitioner alleged and sought to prove that the Respondents were guilty of outrageous conduct, and the jury was instructed on this theory alone. (CT 524, 525, 527, 528; App 38, 40.)



protect its citizens' fundamental interest in peace of mind and freedom from outrageous conduct, even in the often rough-and-tumble milieu of the blue collar worker.

(3) Thirdly, Sections 8(b)(1)(A) and 8(b)(2) are not primarily intended to protect individual workers. Rather, Congress' main concern was the effect of certain kinds of conduct upon the public interest in an orderly process of employee self-organization and collective bargaining. (See 29 U.S.C. §§ 141, 151.) This fact is reflected in the Act's failure to provide any but the scantiest remedies for the kind of harm done the individual by such misconduct, the Labor Board having the power at most to award lost wages to an employee who suffers mistreatment at the hands of his union. (See § 10(c).) It is also apparent from an examination of the Act's legislative history, which reveals not only that Congress declined to enact the employees' "Bill of Rights" originally proposed in H.R. 3020 but that Congress expressly disavowed any intention of reaching internal union affairs. (See Sections I A 1 b and c, supra.) It is further reflected in Congress' subsequent enactment of Title I of the Labor Management Reporting and Disclosure Act and in the legislative history of that Act, which reveals a keen sense of the limited purposes and effects of the Taft-Hartley amendments. (See Sections I A 1 d, supra, and II B 2, infra.)

The remedy applied here was completely distinct from the remedies available under the Labor-Management Relations Act and was

intended to redress a wholly distinct injury from that to which the Act's remedies are addressed. Petitioner not only did not seek back pay for the work he lost because of the union's misconduct toward him, but the jury was instructed that it could award no damages for the loss of work. (CT 530; App 41 .) The only harm for which Petitioner sought and was awarded damages was the injury to his interest in tranquility and peace of mind (CT 524, 525, 527, 528, 540; App 38, 40, 48-49), for which harm the Act provides no remedy whatever.

(4) Finally, the purposes of Linn's requirement of "actual malice" and actual damage are fully satisfied here.

While the requirement that "actual malice" be established has its source in and is peculiarly adapted to the law of defamation (see 383 U.S. at p. 65), the requirement may reasonably be construed as drawing a line between tortious conduct which is willful, reckless or intentional and conduct which is merely negligent. There can be no question that the outrageous misconduct which must be proved under California's law of torts before there can be any recovery for mental distress not resulting in physical injury qualifies as "actually malicious" under this standard.

Linn's requirement of actual damage also has its source in libel law. It is designed to preclude recovery on the basis of a mere presumption of damage, which many states indulge in cases involving certain kinds of libel.

(383 U.S. at pp. 58, footnote 2, 65-66.) The requirement may or may not have much applicability in actions not founded on libel, but assuming that it does, there can be little doubt that California's requirement of a showing of "grievous mental distress" goes well beyond a mere presumption of damage. For present purposes, California law defines "emotional distress" as "any highly unpleasant mental reaction such as fright, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment or worry." (Fletcher v. Western National Life Ins. Co., 10 Cal. App.3d 376, 89 Cal.Rptr. 78 (1970); Rest. 2d Torts, § 46, comment j.) To qualify as "severe" such distress must transcend the "transient and trivial emotional distress that is a part of the price of living among people," and must be "of such substantial quantity and enduring quality that no reasonable man in a civilized society should be expected to endure it." (Ibid.) This sort of injury is no less real, if no more tangible, than the "general injury to reputation, consequent mental suffering, [and] alienation of associates" which Linn held sufficient to support a libel judgment (383 U.S., at p. 66); indeed, there is a remarkable correspondence between the terms California courts use to describe grievous emotional distress and Linn's description of actual damage.

c. It is not without significance that the court in Linn expressly authorized awards of punitive damages for unpre-empted torts, advertent to Laburnum and Russell as having likewise permitted such damages. (383 U.S. at

pp. 65-66.) The Court did so on the evident basis that the four-part test discussed above would provide adequate safeguards against any serious interference by such awards with the effectuation of national labor policy.

2. International Association of  
Machinists v. Gonzales

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a. A second branch of the exception recognized in Garmon has its source in International Association of Machinists v. Gonzales, supra, 356 U.S. 617, which, it will be recalled, was characterized in Garmon as involving matters of peripheral federal concern. In Gonzales, a member's action in state court for reinstatement following expulsion from his union and for lost wages and physical and mental suffering was held not pre-empted by the Labor-Management Relations Act. The plaintiff in Gonzales was expelled from his union by reason of a dispute with union leaders. He became unemployed shortly thereafter, not because the union procured his discharge from his job but because of an injury. When he subsequently recovered from his injury and sought employment through the union hiring hall, he was denied job referrals, whereupon he sued the union. (Gonzales v. International Association of Machinists, 142 Cal. App.2d 207, 209-211, 221-222, 298 P.2d 92 (1956).) It was the refusal of referrals from the union hiring hall which accounted for the larger part of the damages award (\$6800), the remainder

(\$2500) being for mental suffering. The union conceded that the reinstatement order was within the power of the state court, but argued that the damages award was not. This Court disagreed, stating that

"[n]o radiation of the Taft-Hartley Act requires us thus to mutilate the comprehensive relief of equity and reach such an incongruous adjustment of federal-state relations touching the regulation of labor. The National Labor Relations Board could not have given respondent the relief that California gave him according to its local law of contracts and damages. Although if the unions' conduct constituted an unfair labor practice the Board might possibly have been empowered to award back pay, in no event could it mulct in damages for mental or physical suffering. And the possibility of partial relief from the Board does not in such a case as is here presented deprive a party of available state remedies for all damages suffered. See *International Union, United A.A.A.I.W. v. Russell*, 356 US 364, 2 L Ed 2d 1030, 78 S Ct 932.

"If, as we held in the *Laburnum Case*, certain state causes of action sounding in tort are not displaced

simply because there may be an argumentative coincidence in the facts adducible in the tort action and a plausible proceeding before the National Labor Relations Board, a state remedy for breach of contract also ought not be displaced by such evidentiary coincidence when the possibility of conflict with federal policy is similarly remote. The possibility of conflict from the court's award of damages in the present case is no greater than from its order that respondent be restored to membership. In either case the potential conflict is too contingent, too remotely related to the public interest expressed in the Taft-Hartley Act, to justify depriving state courts of jurisdiction to vindicate the personal rights of an ousted union member. . . ."

(356 U.S. at p. 621.)

b. Petitioner argued below and reiterates here that to the extent that this branch of the exception has continued vitality, a matter discussed below, the instant case falls squarely within it. The Court of Appeal was of the opinion, however, that Petitioner's cause of action for infliction of emotional distress was governed by *Motor Coach Employees v. Lockridge*, supra, 403 U.S. 274, *Plumbers Union v. Borden*, supra, 376 U.S. 690



and Ironworkers Union v. Perko, 373 U.S. 701 (1963) rather than by this exception. In Perko, Borden and Lockridge, the acts complained of involved interference with existing or prospective job rights of the involved employee, and in all three cases this Court pointed to such interference as the primary feature which distinguished Lockridge, Borden and Perko from Gonzales, which was said to have focussed on purely internal affairs. The Court of Appeal reasoned herein (see Appendix A to the Petition for Writ of Certiorari, pp. 9-26) that since one of the many instances of misconduct involved actual refusal to refer Petitioner to a job already promised him and since a number of others involved hiring hall discrimination, this case was indistinguishable from Borden, Perko and Lockridge.

Borden was the first labor pre-emption decision to apply the distinction between conduct involving "internal union affairs" and conduct which interferes with existing or prospective employment relations. In Borden, a union member, in apparent violation of a hiring hall rule, obtained the promise of a job from an employer who then requested the member's dispatch from the hiring hall. The union's refusal was the basis of the lawsuit. In Perko, decided with Borden, the plaintiff was a foreman whose employer fired him at the behest of the defendant union, to which the plaintiff happened to belong, although it would not appear that in his capacity as foreman he was a member of any bargaining

unit for which the union served as bargaining representative. The union's request was prompted by the plaintiff's breach of an internal union rule and followed the plaintiff's suspension from membership. Subsequently, it would appear, the union also prevented him from obtaining further work as a foreman.<sup>17/</sup> In Lockridge, the plaintiff was suspended and then expelled from his union and terminated from his job under a union security clause for falling behind in his dues, even though on a fair reading of the security clause the period specified for making good his arrearages may well not have expired.

From the foregoing, it should be obvious that Borden, Perko and Lockridge are hardly distinguishable from Gonzales on the basis that Gonzales focusses upon purely internal affairs while they do not, and that they touch upon employment relations while Gonzales does not. Gonzales, in sustaining an award of damages for lost wages, clearly transcended the purely internal aspects of the dispute which gave rise to

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By what means he was kept from obtaining other supervisory work, the Court's opinion does not make clear, nor does it indicate whether the plaintiff was ever kept from obtaining any other category of employment. In any event, this latter aspect of the union's conduct does not seem to have figured prominently in the Court's reasoning.

the lawsuit, and Borden, Perko and Lockridge arose no less clearly than did Gonzales out of disputes over essentially intraunion matters.

Predictably, there has been much confusion as to how much of Gonzales survived Borden, Perko and particularly Lockridge.

One possible view is that Lockridge and Gonzales are completely inconsistent and that Gonzales was overruled sub silentio by Lockridge at least insofar as Gonzales authorized damages in addition to reinstatement. This seems to have been the view of the dissenters in Lockridge (403 U.S. at pp. 302 et seq.; see also Cox, Labor Law Preemption Revisited, *supra*, 87 Harv.L.Rev. at pp. 1375-1376.)

Another possible view is that to the extent that Gonzales differs from Borden, Perko and Lockridge, Gonzales survives unimpaired, so that an action involving Gonzales' distinguishing features may still result in an award not only of reinstatement in the union if the member has been expelled, but of appropriate damages. This alternative may be more hypothetical than actual, but it would appear that in at least two significant respects the conduct in Gonzales and in this case is in fact distinguishable from that in Borden, Perko and Lockridge.

In the first place, the conduct in Borden, Perko and Lockridge raised issues which might be regarded as particularly within the expertise of the Labor Board and there existed in those cases a risk of inconsistency between judicial resolution of the issues and the Board's resolution if the controversy had been placed before it. In Borden the issue was the validity of the union rule breached by the plaintiff. Since the Board might decide either that the employee had a Section 7 right to ignore the rule or that the rule was proper and enforceable, the union's refusal to honor the employer's dispatch request fell in the "arguable" borderline area between protected or permitted conduct and prohibited conduct. In Perko, the issue was whether the union was chargeable with violations of Sections 8(b)(1)(A) and (B) and Section 8(b)(2) in causing the discharge of a member who might be classified either as a "supervisor" outside the protections of the Act or an "employee" within them. (See §§ 152(3) and (11).)<sup>17a/</sup> Again, these issues placed the union's conduct within the "arguable" zone between protected or permitted conduct and prohibited conduct. Lockridge turned upon the construction of the union security clause under which the plaintiff was terminated, a task for which the Court believed the Board particularly suited. Since the

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As to violation of Section 8(b)(1)(B) see this Court's subsequent discussion in Florida Power & Light v. Electrical Workers, 417 U.S. 790 (1973).



clause might arguably be construed either as supporting or forbidding the union's action, the conduct in Lockridge too might be deemed within the mentioned borderline zone. In Gonzales, on the other hand, the conduct complained of was either clearly outside the Act (certainly the expulsion was in this category) or, to the extent not clearly outside the Act, it was either clearly prohibited under Section 8(b)(2) or arguably prohibited in the second of the two senses discussed above -- that is, it was not by any stretch of the imagination protected. As has already been pointed out (see Section I B 2 c), this case is within the Act or arguably within it (if at all) in precisely the same way.

There are of course problems with this kind of distinction. In the first place, the issue in Lockridge was the meaning of the union security clause, not its validity. As Professor Cox has pointed out, construction of contracts is something courts do all the time and are as competent to do as the Board, Lockridge to the contrary notwithstanding. (Cox, Labor Law Preemption Revisited, supra, 85 Harv. L.Rev. at pp. 1370-1371, 1375.) In the second place, the distinction assumes the propriety of denying courts the power to decide whether conduct arguably within the Act is or is not actually within it even though denial of that power may prevent any resolution of the issue whatsoever. Nonetheless, accepting Lockridge on its own terms and assuming continuing adherence to the Garmon formula, the suggested distinction is tenable.

A second distinction is that the interference with existing or prospective employment relations in Borden, Perko and Lockridge was far more direct and immediate than in either Gonzales or this case. Perko and Lockridge involved a single act directly affecting a job already possessed by the employee, and Borden involved a single refusal to refer the plaintiff to a job actually promised to him. The "crux" of the action in those cases was thus an interference with a member's job of precisely the sort Congress meant to proscribe when it enacted Section 8(b)(2). (See section I A 2 b (2), supra.) Here, by contrast, only one instance of misconduct concerned actual or promised employment and that instance constituted but a small part of the total. Continuing refusal to dispatch Petitioner from the hiring hall -- precisely the kind of conduct for which damages for lost earnings were allowed in Gonzales -- formed a much larger part of the misconduct. Such misconduct obviously does not involve actual or existing employment and it cannot be said to involve even prospective employment in the sense that Borden did.

This distinction is no exercise in mere formalism. As has already been pointed out (see Section I A 2 b, supra) the legislative history of the Act indicates that while Congress specifically intended to ban the closed shop and to prevent the use of union shop agreements to force the discharge of expelled members from jobs they already possessed, Congress never considered whether the Board ought to police job referrals of paid-up union members from hiring



halls operating under permissible collective bargaining agreements in order to protect such members against reprisal for intraunion political activity. Although the Board (see Section I B 2 c, supra) and this Court (see Local 357, International Brotherhood of Teamsters v. NLRB, supra, 365 U.S. 667 at p. 677; Radio Officers v. NLRB, supra, 347 U.S. 17, at pp. 39-42) appear to have concluded that the Act does empower the Board to regulate such referrals, and although Petitioner does not mean to quarrel with that determination, the fact remains that regulation of such activity cannot be regarded as central to the Act's purposes. Indeed, that function must be seen as only peripheral to Congress' main objectives, if the term "peripheral" is to have any meaning in the present context.

A third distinction, turning not on the nature of the conduct involved but on the nature of the relief afforded, is that in Borden, Perko and Lockridge the damages awarded were for lost earnings alone, a form of relief the Board could have given, while in Gonzales the damages award, although including lost earnings, included as well a sum for mental suffering, which was clearly beyond the Board's power. The passage quoted from Gonzales above suggests that the difference between state and federal remedies was one basis for the decision. The instant case is an even clearer case in that regard, since compensatory damages awarded herein included no sum for lost earnings and consisted entirely of damages for severe emotional distress, which could not have been obtained from the Board.

c. The irony of the situation is that to the extent that Borden, Perko and Lockridge encroach at all upon Gonzales, they represent a misreading of Garmon and they ignore the most potent evidence of Congress' intent respecting the issues on which this case turns.

As already noted, Garmon cited Gonzales with evident approval as involving matters of peripheral federal concern. This characterization revealed a clear understanding of Congress' limited purposes in enacting the Labor-Management Relations Act, an understanding not reflected in Borden, Perko and Lockridge. It would be perhaps too much to claim that Garmon's citation to Gonzales exhibits a degree of prescience as to the impact of legislation Congress was deliberating over as Garmon was handed down. But it is in any event a fact that in 1959, Congress, in passing the Labor Management Reporting and Disclosure Act, provided the clearest possible indication not only that the Labor-Management Relations Act had not been intended to regulate relations between union members and their unions -- that is, internal union affairs -- but also that Congress believed that the Labor-Management Relations Act had not been intended to pre-empt state regulation of such internal union affairs.<sup>17b/</sup>

The process of debate and compromise which culminated in the enactment of Title I of

17b/

It is highly significant that the Labor Management Reporting and Disclosure Act receives only footnote reference in the majority opinion in Lockridge (403 U.S., at pp. 288-289, footnote 5) and no mention whatever in Borden and Perko.

the Labor Management Reporting and Disclosure Act commenced when Senator McClellan of Arkansas, to everyone's evident surprise, proposed a sweeping "Bill of Rights" for union members as a floor amendment to S. 1555, a bill which until then had been rather narrowly focussed on specific abuses uncovered in the hearings before the McClellan Committee (2 NLRB, Leg. Hist. of LMRDA, p. 1102); see Aaron, The Labor Management Reporting and Disclosure Act of 1959, 73 Harv.L.Rev. 851, 858-859 (1960).) Doubtless recognizing that the proposed "Bill of Rights" would be highly unpalatable to organized labor, which had actually supported a bill similar to S. 1555 the previous year, Senator John F. Kennedy, one of the sponsors of S. 1555, opposed the McClellan amendment, arguing that "if the proposal were enacted, the present rather exhaustive remedies under the common law of various states might be wiped out." (2 NLRB, Leg. Hist. of LMRDA, p. 1108.) Senator Kennedy emphasized that the states had provided "broad protections for members of voluntary organizations," and cautioned his colleagues that enactment of the amendment might be detrimental to rather than promotive of the rights of union members. (2 NLRB, Leg. Hist. of LMRDA, p. 1109.) Senator Kennedy specifically referred to a classic law review article by Professor Clyde Summers (Summers, Legal Limitations on Union Discipline, 64 Harv. L. Rev. 1049, 1050-1051 (1951)) stating that the cases discussed in the article "show the broad protections which are given to union members by state courts for any breach of their right to speak, against being expelled from unions, and

against excessive fines." (2 NLRB, Leg. Hist. of LMRDA, p. 1113.)<sup>18/</sup> In reply to Senator Kennedy's argument, Senator Holland of Florida suggested that "[a]ny plenary provision against pre-emption would certainly preserve states' rights as they are, and it would, at the same time create a new body of effective federal law. . . . There is nothing new in the idea of concurrent legislation or concurrent protection of rights." (2 NLRB, Leg. Hist. of LMRDA, pp. 1109-1110.) In response to Senator Kennedy's arguments and Senator Holland's suggestion, Senator McClellan then offered a further amendment, later enacted as Section 603(a) of the Act (29 U.S.C. § 523(a)), specifically preserving members' rights and remedies under other

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It is interesting to note that in the course of the debates, Senator Kennedy indicated that union members' rights could be adequately protected not only by state application of existing state law but by state enforcement of the Taft-Hartley amendments. Senator Kennedy acknowledged that Senator Morse of Oregon was correct in attributing to Kennedy the following position: "[Senator Kennedy] feels that this amendment is not necessary because already, under the Taft-Hartley law . . . there is adequate protection if the states, in turn, will carry out the provisions of the Taft-Hartley law in this particular field." (2 NLRB, Leg. Hist. of LMRDA, p. 1111; see also pp. 1108, 1110.)



federal and state laws. (2 NLRB, Leg. Hist. of LMRDA, p. 1114.)<sup>19/</sup>

Senator McClellan's "Bill of Rights" amendment was initially adopted by the Senate (2 NLRB, Leg. Hist. of LMRDA, p. 1119) but upon cooler reflection, a bipartisan group of senators decided that Senator McClellan's "Bill of Rights" was too loosely worded, and drafted a tighter version which was offered by Senator Thomas Kuchel of California and adopted by the Senate in place of the McClellan version (2 NLRB, Leg. Hist. of LMRDA, pp. 1220-1239; Aaron, The Labor Management Reporting and Disclosure Act of 1959, supra, 73 Harv. L. Rev. 851, 859.) A second savings provision included in the Kuchel version was enacted without further amendment

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Section 603(a) provides as follows:

"Except as explicitly provided to the contrary, nothing in this Chapter shall reduce or limit the responsibilities of any labor organization or any officer, agent, shop steward, or other representative of a labor organization . . . under any other Federal law or under the laws of any State, and, except as explicitly provided to the contrary, nothing in this Chapter shall take away any right or bar any remedy to which members of a labor organization are entitled under such other Federal law or law of any State."

as Section 103 of the Act.<sup>20/</sup>

What emerges from the foregoing is that there was a common belief among both those favoring and those opposed to the "Bill of Rights" that the states still possessed the power to protect union members against mistreatment by their unions. Moreover, it is obvious that Congress intended that the states continue to enjoy their assumed existing power without let or hindrance, even where state law might go well beyond federal law, and that union members have a free choice between state or federal courts and state or federal law. (See Summers, Preemption and The Labor Reform Act -- Dual Rights and Remedies, 22 Ohio St.L.J. 119, at p. 125 (1961); Boilermakers v. Hardeman, 401 U.S. 233, at p. 244, Footnote II.)

An examination of the state law to which the 1959 debates referred is highly instructive.

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Section 103 provides as follows:

"Nothing contained in this title [Title I] shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal or under the constitution and by-laws of any labor organization." (29 U.S.C. § 413.)



From the inception of the labor movement, the courts had encountered disputes between unions which were attempting to organize workers and individual employees who refused to join. In some states, the courts held that it was unlawful for a union to prevail upon an employer to discharge or refuse to hire non-union workers when the union's purpose was "to compel the latter against their will to join the association ..." (Plant v. Woods, 176 Mass. 492, 502, 57 N.E. 1011 (1900); Fairbanks v. McDonald, 219 Mass. 291, 106 N.E. 1000 (1914); Ruddy v. United Association, 79 N.J.L. 467, 75 A. 742 (1910), *aff'd* 81 N.J.L. 574, 79 A. 1119 (1911); Perkins v. Pendleton, 90 Me. 166, 38 A. 96 (1897).) It would be a gross exaggeration, however, to say that individual working men could rely on the protection of law in this kind of situation, and indeed judicial thought on the issue was not unanimous. In a famous dissent in Plant v. Woods, *supra*, Justice Oliver Wendell Holmes acknowledged that interference with employment relations is ordinarily actionable, but concluded that such interference by a union may be justified when its purpose is to achieve the "unity of organization [which] is necessary to make the contest of labor effectual." (176 Mass. at p. 505.) Some courts, most notably those of New York, rejected the notion that such interference was illegal *per se*, in favor of a test which looked to the legality of the means which the union had employed in furtherance of its organizing goals. (See National Protective Association of Steam Fitters v. Cumming, 170 N.Y. 315, 63 N.E. 369 (1902).)

The courts also encountered bitter disputes between unions and individual employees who were denied admission to the organization because of high unemployment among union members, personal enmity, or racial animus. Here too, although the courts sometimes afforded some protection to the working man (see Lucke v. Clothing Cutters' & T. Assembly, 77 Md. 396, 26 A. 505 (1893); Carter v. Oster, 134 Mo. App. 146, 112 S.W. 995 (1908); see also Jones v. Marinship Corporation, 25 Cal.2d 721, 155 P.2d 329 (1944)), the law was usually unavailing. (See Cox, Internal Affairs of Labor Unions Under the Labor Reform Act of 1959, *supra*, 58 Mich. L.Rev. at p. 841.)

Because of the glaring insufficiency of existing protections in these areas, it should hardly be surprising that when the Congress enacted the Taft-Hartley Act it saw the closed shop and coercive organizing tactics as abuses particularly requiring prohibition.

Cases involving disputes between union members and their unions presented a marked contrast to disputes arising between unions and non-members. Typical of member-union disputes were cases in which a union punished a "disobedient" member by causing him to be discharged from his job and by threatening other potential employers with "labor trouble" in the event that they hired him. In some cases, the union expelled the individual from the union and he was then automatically terminated under a closed shop agreement. (See, e.g., Brennan v. United Hatters, 73 N.J.L. 729,

65 A. 165 (1906).) In other instances, although the individual was not expelled from membership, he lost his job and the opportunity to find other work as a result of pressure exerted upon employers by the union. (See Blanchard v. Newark Joint Dist. Council, 77 N.J.L. 389, 71 A. 1131 (1909).)

Many of the early decisions in this area analogized unions to such other voluntary associations as churches and fraternal organizations and, reflecting a traditional reluctance to interfere with the affairs of those voluntary associations, held that courts lacked jurisdiction to review membership decisions of labor unions. (See Summers, Legal Limitations on Union Discipline, *supra*, 64 Harv. L. Rev. at 1050-1051.) But even though an expulsion might not have been subject to judicial review, the courts came increasingly to allow actions against unions for conspiracy and tortious interference with employment relations in favor of an individual member whose "right to his handiwork as a means of subsistence [had] been malevolently taken away . . . ." (Shinsky v. Tracey, 226 Mass. 21, 24, 114 N.E. 957 (1917); See also Brennan v. United Hatters, *supra*, 73 N.J.L. 729, 65 A. 165; Connors v. Connolly, 86 Conn. 641, 86 A. 600 (1913).)

Eventually, the courts recognized that voluntary organizations like labor unions and professional associations differ markedly from other voluntary associations in that they often exercise a "strangle-hold upon their members through their control of an occupation. . . which can ill be spared."

(Chaffee, The Internal Affairs of Associations Not for Profit, 43 Harv. L. Rev. 993, 1022 (1930).) Accordingly, since loss of union membership frequently meant that an individual would lose his job and the opportunity for any employment within his trade, the courts granted relief in particular cases by invoking the fiction that the individual had been deprived either of "property rights" or of rights under an implied contract between the union and its members. (See Summers, Legal Limitations on Union Discipline, *supra*, 64 Harv. L. Rev. at pp. 1050-1058.) Or, as California Supreme Court Justice Matthew O. Tobriner has expressed it, the common law courts "cut through traditional contract principles to establish rights and obligations based on relationship or status." (Tobriner & Grodin, The Individual and The Public Service Enterprise, 55 Cal. L. Rev. 1247, 1260 (1967); See also, Pinsker v. Pacific Coast Society of Orthodontists, 12 Cal. 3d 541, 553-554, 116 Cal. Rptr. 245, 526 P.2d 253 (1974).)

The prevailing view thus came to be that union membership is a legally protected interest subject to a broad range of remedies, including reinstatement for wrongful expulsion. (See, e.g., Madden v. Atkins, 4 N.Y. 2d 283, 174 N.Y.S.2d 633, 151 NE2d 73 (1958); Williams v. National Organization, Masters, Mates & Pilots, 384 Pa. 413, 120 A.2d 896 (1956); Cason v. Glass Bottle Blowers Association, 37 Cal.2d 134, 231 P.2d 6 (1951); Leo v. International Union of Operating Engineers, 26 Wash.2d 498, 174 P.2d 523 (1946); Annotation, 74 ALR 2d 783 (1958);



Annotation, 21 ALR 2d 1397 (1951).)

Remedies came to reflect the full range of the harms which might flow from wrongful expulsion or discipline of a member by his union. In the article to which Senator Kennedy referred on the floor of the Senate, Professor Summers summarized these remedies as follows:

"If the expulsion has caused the disciplined member to be discharged or has prevented him from obtaining work, he can recover the wages lost as a result of the wrongful expulsion. Although he must attempt to mitigate damages by seeking other work, he need not pay an illegal fine or assessment in order to maintain himself in good standing and protect his employment rights. Damages are not always limited to loss of wages, but may include mental suffering resulting from humiliation, loss of association, and injury to reputation, and if the discipline was in bad faith, punitive damages may be awarded."

(Legal Limitations on Union Discipline, supra, 64 Harv. L. Rev. at pp. 1093-1094; Footnotes omitted.)<sup>21/</sup>

<sup>21/</sup>

Professor Cox in fact found existing state remedies so satisfactory that he saw little point in the "Bill of Rights" provisions governing in-

(con't p. 83)

It is noteworthy that while damages awards often accompanied orders of reinstatement, damages for lost wages and other consequential effects of wrongful expulsion were frequently awarded in the absence of an order, or even a request, for reinstatement in a union. (See, e.g., Cason v. Glass Bottle Blowers Association, supra, 37 Cal.2d 134, 231 P.2d 6; Savard v. Industrial Trades Union, 76 R.I. 496, 72 A.2d 660 (1950); Walker v. Grand International B. of L. Engineers, 186 Ga. 811, 199 S.A. 146 (1938); Grand International B. of L. Engineers v. Green, 210 Ala. 496, 98 So. 569 (1923).)

It should be clear from the foregoing that while Gonzales may today be the orphan child of labor pre-emption law, the judgment of the state court which was affirmed in Gonzales was by no means atypical under pre-Garmon law. It should also be clear that the present action, while presenting more egregious union abuses, is different in kind from the common run of cases arising under the body of state law which Congress expressly indicated it wanted to preserve.

<sup>21/</sup> (con't)

internal union discipline (§ 411(a)(5)), deeming them essentially a codification of existing law. (Cox, Internal Affairs of Labor Organizations Under the Labor Reform Act of 1959, supra, 58 Mich. L. Rev. at pp. 835-838.)



C. Recognized Exceptions for Actions Founded Upon Breach of a Union's Duty of a Fair Representation or Upon Improper Imposition of Union Discipline are also Applicable

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The three causes of action to which Respondents' demurrer was sustained in the trial court were attempts to invoke some of the other exceptions described above. (See Section II A, supra.) It may be that those causes of action and the various other applicable exceptions are not before this Court in any direct sense, but the other exceptions do merit consideration here because they illustrate to what extent Congress and the courts have permitted lawsuits founded upon conduct supposedly within the purview of the Labor-Management Relations Act and the jurisdiction of the Board, and thus what kinds of conduct may be regarded as of only peripheral concern to the scheme of labor relations regulation embodied in the Act. Moreover, it is by no means certain that the allegations of the single surviving cause of action herein do not suffice to state a claim within the recognized exceptions for actions for breach by a union of its duty of fair representation, or for a union's imposition of discipline upon a member in violation of the procedural and substantive standards set forth in the Labor Management Reporting and Disclosure Act. Indeed, at least as to cases involving breach of the duty of fair representation, this Court has held that in order

to do substantial justice, the pleadings must be liberally construed (See Czosek v. O'Mara, 397 U.S. 25, 27 (1970)) and both federal and California law have long rejected the doctrine of "theory of the pleadings." (Federal Rules of Civil Procedure, Rule 8(a); Nord v. McIlroy, 296 F.2d 12, 14 (9th Cir., 1961); Fletcher v. Western Nat'l. Life Ins. Co., supra, 10 Cal. App.3d 376, 399, 89 Cal.Rptr. 78.) Petitioner therefore submits that whatever the form or theory of the single cause of action on which he was permitted to go to trial, if the misconduct complained of therein falls within either of these further exceptions, his action ought not to be deemed pre-empted.

1. Duty of Fair Representation

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a. The concept of a union's duty to fairly represent its members is a broad one. It is in essence the responsibility of a union selected as exclusive bargaining agent by a majority of the employees to discharge its agency by making a genuine effort to represent the interest of each employee fairly, without hostility and in complete good faith and honesty. (Hines v. Anchor Motor Freight, Inc., \_\_\_ U.S. \_\_\_ (March 3, 1976); Humphrey v. Moore, 375 U.S. 335, 342 (1964); Ford Motor Co. v. Huffman, 345 U.S. 330, 337-338 (1952).)

Originating in this Court's decision in Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944) a case arising under the Railway

Labor Act (45 U.S.C. § 151 et. seq.) and involving racially motivated discrimination by a union against some of the employees it represented, the concept of the duty of fair representation quickly migrated into the National Labor Relations Act and was eventually broadened to proscribe union discrimination against members based on considerations quite apart from racial prejudice. (Vaca v. Sipes, supra, 386 U.S., at p. 182; see, A Matter of Wooden Logic: Labor Law Preemption and Individual Rights, supra, 51 Tex. L. Rev., 1059-1065, 1095-1109.)

The issue of breach of the duty of fair representation may arise either in the context of a suit under Section 301 of the Labor-Management Relations Act for breach of a provision of a labor agreement (Vaca v. Sipes, supra, 386 U.S. 171, 186; Buzzard v. Local Lodge 1040, International Association of Machinists, supra, 480 F.2d 35, 40) or in a suit involving no such contractual breach (Vaca v. Sipes, supra, 386 U.S. at p. 187, as characterized in Motor Coach Employees v. Lockridge, supra, 403 U.S. 274, 299; Smith v. Sheet Metal Workers, 500 F.2d 741 (5th Cir., 1974); Retana v. Apartment, Motel, etc. Union, 453 F.2d 1018 (9th Cir., 1972)). Such actions for breach of the duty of fair representation lie outside the scope of the pre-emption doctrine and may be brought in either state or federal courts. (Motor Coach Employees v. Lockridge, supra, 403 U.S. 274, 298; Vaca v. Sipes, supra, 386 U.S. 171, 181-187.)

b. Here, Section 204.1 of the Master Labor Agreement between the District Council and the involved employers provided for "open and nondiscriminatory employment lists for the use of workmen desiring employment on work covered by this Agreement." <sup>22/</sup> (CT 105; App 5 .) Section 204.4 of the Master Agreement further provided as follows:

"The local Union or District Council will dispatch in accordance with the request of the Contractor . . . qualified and competent workmen from among those entered on said lists . . . in the following order of preference and the selection of workmen . . . shall be on a nondiscriminatory basis:

"204.4.1 Workmen specifically requested by name . . .

"204.4.2 Workmen who, within the five years immediately before the Contractor's order for men have performed work of the type covered by this Agreement in the geographic area of the Agreement . . . , provided such workmen are available for employment." (CT 105-106; App 5-6.)

<sup>22/</sup>

This Agreement was introduced by Petitioner as an exhibit without objection from Respondents. (RT 686; Ex. 32.)



The Respondents' refusal to dispatch Petitioner in response to the single specific employer request involved herein was an obvious breach of Sections 204.4 and 204.4.1 of the Master Agreement. Respondent's continuing refusal to dispatch Petitioner when his name reached the top of the out-of-work list and their use of a number of pretexts to place his name at the bottom of the list constituted an indisputable violation of Sections 204.4 and 204.4.2 of the Master Agreement. These breaches of their contractual obligations to Petitioner gave rise to a clear right of action under Section 301 of the Labor-Management Relations Act. (Buzzard v. Local Lodge 1401 International Association of Machinists, supra, 480 F.2d 35, 40; Breittger v. Columbia Broadcasting System, 43 Cal.App.3d 283, 117 Cal.Rptr. 699 (1974); Magallanes v. Local 300 Laborers' International Union, 40 Cal.App.3d 809, 115 Cal.Rptr. 428 (1974); Shaw v. Metro-Goldwyn-Mayer, Inc., 37 Cal.App.3d 587, 113 Cal.Rptr. 617 (1974); cf. Richardson v. Communications Workers of America, 443 F.2d 974, 980-981 (8th Cir., 1971).)

Moreover, even ignoring the foregoing breaches of the provisions of the Master Agreement, the hiring hall discrimination and the campaign of harrassment and intimidation directed at Petitioner were beyond question a violation of the union's duty of fair representation and the mental anguish they caused was beyond all doubt actionable. (See Smith v. Sheet Metal Workers, supra, 500 F.2d 741; Richardson v. Communications Workers of America, supra, 443 F.2d at pp. 982-985; see also Magallanes v. Local 300,

Laborers' International Union, supra, 40 Cal.App.3d at pp. 815-816, 817; Shaw v. Metro-Goldwyn-Mayer, Inc., supra, 37 Cal.App.3d at pp. 599-601.

c. In the Court of Appeal, Respondents claimed that the judgment herein could not be sustained on a theory of breach of the duty of fair representation, even assuming that theory was properly before the Court of Appeal, because (1) Petitioner had not exhausted his internal union remedies (App. Op. Br., p. 6; App. Rep. Br., pp. 6-8), (2) punitive damages may not be awarded in an action for breach of the duty of fair representation (App. Op. Br., pp. 93-97; App. Rep. Br., pp. 19-20) and (3) the jury was not properly instructed with respect to the duty of fair representation (App. Rep. Br., pp. 6-8). On the assumption that these issues will be again raised in this Court, Petitioner addresses each of them.

(1) It is sufficient to indicate with respect to exhaustion of internal union remedies that Petitioner twice sought aid from the District Council and it was twice refused. (See Summary of Facts, supra.) It is significant that while Respondents claimed in the Court of Appeal that they might somehow show that Petitioner's efforts were in some sense insufficient (App. Rep. Br., pp. 6-7), their responses to interrogatories during the course of discovery indicate that Petitioner's efforts were all that the union's own rules required of him. (CT 478, 483; App 22-23.)



It might be added that Respondents can hardly claim that they were unaware at the time of trial that the issue was actually or potentially an important one, since they had included failure to exhaust internal remedies as an affirmative defense in the Answer they filed to the First Amended Complaint after their demurrer had been sustained to the first, third and fourth causes of action thereof. (CT 206; App 21.) Moreover, because Petitioner's evidence that the District Council had turned a deaf ear to his entreaties tended to show that the District Council had knowingly concurred in and ratified the acts of Daley and his disciples and because without such ratification the District Council could not be held liable for any punitive damages awarded (Coates v. Construction and General Laborers Local 185, 15 Cal.App.3d 908, 913-914, 93 Cal. Rptr. 639 (1971); see CT 541; App 49), the District Council had every motive for showing that Petitioner had never made a cognizable appeal to it for relief from Daley's abuse. But the District Council offered no evidence whatever that Petitioner had failed to invoke its aid in a proper manner.

In any event, the courts have shown a high degree of tolerance toward failure by a mistreated union member to follow to the letter prescribed internal union procedures before filing suit when it is clear that the member has substantially complied or that even the most punctilious compliance would have been futile. (Peterson v. Rath, Packing Co., 461 F.2d 312, 315-316 (7th Cir., 1972);

Gray v. International Assn. of Heat Workers, 447 F.2d 1118, 1123-1124 (6th Cir., 1972); Frederick v. System Federation No. 114, 436 F.2d 764, 768-769 (9th Cir., 1970); see Dorn v. Meyers Parking System, 395 F.Supp. 779, 782-786 (E.D.Pa., 1975); Simpson & Berwich, Exhaustion of Grievance Procedures and the Individual Employee, 51 Tex. L. Rev. 1179, 1214-1226 (1973).)

(2) As to the availability of punitive damages in an action for breach of the duty of fair representation, the authorities are somewhat split (compare Williams v. Pacific Maritime Association, 421 F.2d 187 (9th Cir., 1970) and Holodnak v. AVCO Corp., 514 F.2d 285 (2nd Cir., 1975) with Harrison v. United Transportation Union, 530 F.2d 558, 562 (4th Cir., 1975); Zamora v. Massey-Ferguson, 336 F.Supp. 588, 591 (S.D. Iowa, 1972); and Tippett v. L & M Tobacco Co., 316 F.Supp. 292, 298 (D.N.C., 1970); Patrick v. I.D. Packing Co., 308 F.Supp. 821, 824, 826 (S.D. Iowa, 1969); Sidney Wanzer & Sons, Inc., v. U.S. Milk Drivers Union, 249 F.Supp. 664, 670-671 (N.D.Ill., 1966)) but the most recent and by far the best-reasoned authority favors such awards.

Williams and Holodnak, supra, which were relied upon by Respondents in the Court of Appeal, are weak authority indeed. Williams, a brief one and one-half page opinion, devotes a scant thirty-three words to the issue (421 F.2d at p. 1289). Holodnak sidesteps the issue, concluding simply that "exemplary damages are not available . . .

in the sui generis circumstances before us." (514 F.2d at p. 293.) Far from suggesting that punitive damages should be disallowed in all cases, this determination indicates that in some cases they may be appropriate.

The Harrison case, on the other hand, offers compelling policy considerations in support of punitive damages awards:

"All jurisdictions agree that the purposes of punitive damages are to vindicate the plaintiff, punish the wrongdoer and set an example that the tortious conduct should not be repeated. See Northwestern National Casualty Co. v. McNulty, 307 F.2d 432, 435-36 (5 Cir. 1962); Adams v. Hunter, 343 F.S. 1284 (D.S.C. 1972); aff'd, 471 F.2d 648 (4 Cir. 1973). While compensatory damages may to some degree serve the same purposes, it is not unusual in a fair representation suit against a union to find the liability for compensatory damages to be de minimus. (St. Clair v. Local No. 515, [61 LC para. 10,559] 422 F.2d 128, 132 (6 Cir. 1969). Unless punitive damages are available an employee may lack the strong legal remedy necessary to protect his right against a union which has either maliciously or in utter disregard of his rights denied him fair representation. The situation is analagous to that

present in civil rights actions where the plaintiff's rights are equally important and often difficult to enforce without the threat to defendants of liability for punitive damages in an aggravated case. Courts have held in civil rights suits that the 'federal common law of damages' is controlling and permits the recovery of exemplary or punitive damages, even in those cases where compensatory damages may be merely nominal. Basista v. Weir, 340 F.2d 74, 87 (3 Cir. 1965). " 530 F.2d, at p. 562.

Respondents also relied in the Court of Appeal on an analogy which they perceived between actions brought under Section 301 of the Labor-Management Relations Act and actions brought under Section 303 of the Act for damages suffered by an employer through union violation of Section 8(b)(4). (App. Op. Br., p. 97.) Respondents quite correctly pointed out that under Teamsters Local 20 v. Morton, supra, 377 U.S. 252, punitive damages cannot be recovered in a Section 303 action. The distinction between Section 303 and Section 301 actions should be obvious, however. It is one thing to prohibit punitive damages in an action for economic loss suffered through a union's misuse of its economic weapons against an employer who is clearly its adversary and who has economic weapons of his own with which to defend himself. It is quite another to bar such damages when union officials



ignore their obligations toward a helpless member to whom they stand in a fiduciary relation (see Richardson v. Communication Workers of America, supra, 443 F.2d at p. 980) and vengefully use their awesome powers over his welfare to do him harm.

As a matter of fact, the mentioned distinction between employer actions and member actions not only explains why the rule against punitive damages in the former situation should not bar such damages in the latter situation, but it confirms the wisdom of the reasoning of the Court of Appeal in Harrison v. United Transportation Union, supra. The purely compensatory damages recoverable by an employer are potentially large enough to render violations of Section 8(b)(4) counter-productive, so that the deterrent function of Section 303 actions will be well enough served in the usual case without the need for punitive damages. On the other hand, as Harrison points out, the harm done by union misconduct toward an individual member, though it may well be catastrophic to the member, will seldom be so severe in absolute dollar terms that the threat of an award of compensatory damages alone will have any appreciable deterrent effect upon the union.<sup>23/</sup>

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Certainly in this case the back pay award Petitioner received for the Respondents' refusal to honor the employer dispatch request did nothing to deter further like misconduct.

It might be added that since in cases like this one there is an area of overlap between the right to be fairly represented and the rights afforded by the Labor Management Reporting and Disclosure Act, and since punitive damages may clearly be recovered in actions brought under the Labor Management Reporting and Disclosure Act (see Section II C 2 d, infra) it makes no sense whatever to deny punitive damages in duty of fair representation actions. To the contrary, the more rational course would be to give across-the-board recognition to the courts' clear judgment that permitting union members suffering mistreatment at the hands of their unions to recover punitive damages will not offend and indeed will tend to effectuate national labor policy.

(3) As to jury instructions, while it is true that the jury was not specifically instructed on the law governing an action for breach of the duty of fair representation, the instructions actually given imposed on Petitioner a far more onerous burden of proof. Instead of the arbitrary or bad faith conduct which the jury would have had to find to support a determination that the Respondents had breached their duty of fair representation (see Vaca v. Sipes, supra, 386 U.S. at p. 190; Motor Coach Employees v. Lockridge, supra, 403 U.S. at pp. 299-301) the jury was required to find outrageous conduct which inflicted severe emotional distress. (CT 515, 524, 527, 528; App 34, 38, 40.)

In addition, the jury was instructed that it must find "oppression" or "actual malice" before it could award punitive damages. (CT 540; App 48-49.)



Obviously, oppression or actual malice goes far beyond mere arbitrary or bad faith misconduct.

2. Actions Under the Labor Management Reporting and Disclosure Act

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a. As already noted, actions brought for violation of the protections of the Labor Management Reporting and Disclosure Act are outside the scope of the Garmon rule. (Hardeman v. Boiler-makers, supra, 401 U.S. 233, 237-241; Boiler-makers v. Braswell, 388 F.2d 193, 196-197 (5th Cir., 1968); Machinists v. King, 335 F.2d 340, 346-347 (9th Cir., 1964).) Section 102 of the Act specifically authorizes actions to be brought in federal court, but it is silent as to actions in state court. Such authority as exists on the issue is in conflict as to state jurisdiction to entertain such lawsuits. (Compare Safe Workers' Organization v. Ballinger, 389 F.Supp. 903, 910-913 (S.D. Ohio, 1974) with Summers, Pre-emption and the Labor Reform Act--Dual Rights and Remedies, supra, 220 Ohio St.L.J., at pp. 149-151.) But Section 102 resembles Section 301 of the Labor-Management Relations Act in referring only to federal jurisdiction, and Section 301, as we have seen, has been held to authorize actions upon labor agreements in state courts. (Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 506-507 (1962).) Because Section 301 and Section 102 actions may cover identical conduct, it would

seem irrational to permit state courts to assume jurisdiction as to suits arising under the former section but not under the latter. In any event, whether or not a state court may entertain suits founded upon Section 101 and brought under Section 102, state law may clearly be applied by state courts to reach conduct which could be made the subject of a suit under the Labor Management Reporting and Disclosure Act. (See Section II C 2 c, supra.)

b. To the extent that the campaign of harrassment, intimidation and referral discrimination pursued by business agent Daley and others under his control was in reprisal for Petitioner's failure to fall in line with Daley and his policies, it constituted a form of informal discipline. Indeed the thrust of much of the defense offered by Respondents at trial was that their outrageous conduct toward Petitioner was justified because Petitioner was making matters very difficult for Daley and his friends, and because he sometimes caused trouble on the jobs to which he was dispatched. (See pp. 56-61 of the Respondents' Brief filed by Petitioner in the Court of Appeal.) Such informal discipline is wholly improper under the Labor Management Reporting and Disclosure Act.

Perhaps the central provision of the Labor Management Reporting and Disclosure Act's "Bill of Rights" is Section 101(a)(2) which provides as follows:

"Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views on candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings...."

The obvious purpose of Section 101(a)(2) was to encourage vigorous union debate and to assure union members the right of free expression on intra-union affairs without fear of reprisals.

Another important provision is Section 101(a)(5), which provides as follows:

"No member of any labor organization may be fined, suspended, expelled or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing."

Section 102 of the Labor Management Reporting and Disclosure Act provides that a union member may file suit for appropriate relief if any rights secured to him by Title I are "infringed." Furthermore, Section 609 of the Labor Management Reporting and Disclosure Act "makes doubly secure the protection of the members in the exercise of their rights" (See Salzhandler v. Caputo, 316 F.2d 445, 449 (2nd Cir., 1963)) by making it unlawful "for any labor organization, or any officer [or] agent ... thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this Act," and by specifically providing that any violation of Section 609 may be the subject of a civil action brought under Section 102.

The major interpretive issue, of course, is whether a union member's Section 101(a)(5) right to fair discipline is "infringed" within the meaning of Section 102, or the member is "otherwise disciplined" within the meaning of Section 609, when, in retaliation for his exercise of the right of free expression guaranteed by Section 101(a)(2), a union official makes it impossible for him to secure employment by refusing to make job referrals under an exclusive hiring hall agreement, such as existed here.

(1) The vast majority of the courts which have considered the issue have ruled that "union interference with the employment opportunities of its members may constitute 'discipline,'" and that such informal discipline violates



Section 101(a)(5) when imposed without the required procedural safeguards. (Figueroa v. National Maritime Union, 342 F.2d 400, 406 (2nd Cir., 1965) [refusal to refer under exclusive hiring hall agreement]; Detroy v. American Guild of Variety Artists, 286 F.2d 75, 81 (2nd Cir., 1961) [blacklisting]; see also, Robins v. Schonfeld, 326 F.Supp. 525 (S.D.N.Y., 1971) [blacklisting]; Tirino v. Local 164, Bartenders etc. Unions, 282 F.Supp. 809, 816-817 (E.D. N.Y., 1968) [procural of dismissal from job and refusal to provide referrals through hiring hall]; Burris v. International Brotherhood of Teamsters, 224 F.Supp. 277, 279 (W.D.N.C., 1963) [blacklisting]; see also Christensen, Union Discipline Under Federal Law: Institutional Dilemmas in an Industrial Society, 43 N.Y.U. L. Rev. 227, 232-239 (1968); Etelson and Smith, Union Discipline Under the Landrum-Griffin Act, 82 Harv. L. Rev. 727, 732-735 (1969).)

(2) However, even assuming arguendo that interference with employment opportunities does not constitute "discipline" for the purposes of the procedural protections of Section 101(a)(5), it does not necessarily follow that such interference is not proscribed by Section 609. Nearly all of the circuits which have considered the issue have striven to protect the individual member's interest in his substantive right of free speech on internal union affairs and have concluded that despite the similar language, Section 609 has a broader reach than Section 101(a)(5), precluding any retaliation for a member's exercise of free speech.

Thus, in Machinists v. King, supra, 335 F.2d 340, where officer-members of a union were summarily removed from office because they had supported an unsuccessful candidate in a union election, it was held that while the procedural safeguards of Section 101(a)(5) do not protect an officer from being summarily removed from office (335 F.2d at 341-343), the members had been unlawfully "disciplined" within the meaning of Section 609 because their removal from office had been in reprisal for their exercise of protected rights. The court therein concluded as follows:

"Thus, to construe Section 609 to exclude from its coverage dismissal from union office would immunize a most effective weapon or reprisal against officer-members for exercising political rights guaranteed by the Act without serving any apparent legislative purpose; and, as we have noted, the members thus exposed to reprisal would be those whose uninhibited exercise of freedom of speech and assembly is the most important to effective democracy in union government." (335 F.2d at p. 345.)

As recently as January of this year, the court which decided King reaffirmed its holding therein. (Cooke v. Orange Belt Dist. Council of Painters, 529 F.2d 815 (9th Cir., 1976). Moreover, at least four other circuits have been persuaded by reasoning in King. Gabauer v. Woodcock, 520 F.2d 1084, 1090-1091 (8th Cir., 1975); Wood v. Dennis, 489 F.2d 849, 854 (7th Cir., 1973); Schonfeld v. Penza, 477 F.2d 899, 903



(2nd Cir., 1973); Sewell v. Machinists, 445 F.2d 545, 550 (5th Cir., 1971); but see Wambles v. Teamsters, 488 F.2d 888, 889 (5th Cir., 1974); Sheridan v. Carpenters Local 626, 306 F.2d 152, 156 (3rd Cir., 1962) [opinion of Kalodner, J..]

If it is thus clear that the threat of dismissal from union office has an unduly coercive affect on a member's uninhibited exercise of free speech, it should be no less clear that the threat of perpetual unemployment provides a much stronger mechanism for the stifling of dissent and of vigorous union debate. And while the union may have an arguably legitimate interest in demanding the loyalty of its officers, there is no conceivable legitimate union interest in blacklisting ordinary members who speak out. Blacklisting or refusal of job referrals through an exclusive hiring hall, when done in retaliation for a member's political opposition within the union must therefore constitute unlawful "discipline" within the meaning of Section 609.

It should be added that an interpretation of the term "discipline" so narrow as to preclude a union member from suing for any wrongful act other than an expulsion, suspension, or fine, is inconsistent with the proscription in Section 609 of unlawful conduct by "any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof . . .," since many persons within the categories enumerated are not empowered by a union to expel, suspend or fine a member. Rather, such persons are capable only of inflicting less formal (if no less

damaging) kinds of punishment, like physical violence or interference with a member's job rights. Since Section 609 recognizes that these persons are capable of imposing "discipline," it would appear that such misconduct as violence, intimidation or interference with job rights was intended to be remediable by a civil suit under the Labor Management Reporting and Disclosure Act. Indeed, it would be a startling anomaly for Congress to have authorized the courts to fashion a panoply of remedies (which now include compensatory damages, punitive damages and awards of attorney's fees) in order, for example, to protect a member against formal suspension from the union for exercising his right to speak out, but to have denied similar relief to a union member subjected for identical reasons to the worst kind of informal discipline, like that involved here, which may result in far more serious economic and emotional harm. The legislative history manifestly demonstrates that Congress entertained no such intent.

In introducing his proposed "Bill of Rights of Members of Labor Organizations," Senator McClellan stated that:

"The [McClellan- committee found time and again the denial of the right to vote, the denial of the right to work, the denial of the right to have a voice, the denial of the basic human rights on which our very freedom was founded. "  
(2 NLRB Leg. Hist. of the LMRDA, p. 1103; emphasis added.)

Senator McClellan alluded specifically to the problem of union blacklisting in retaliation for a member's exercise of protected rights and emphatically stated that his amendment would seek to remedy that problem:

"They are afraid of reprisals against them. Two waitresses from Chicago testified that it required six months to get a job. Union officials go around and interfere. They say to a prospective employer, 'If you hire this person, you will have labor trouble.' They cannot come here and tell the truth without risking reprisals.

"This provision is for the benefit of the working people, the people from whom some of these parasites draw the life blood which courses through their veins." (2 NLRB Leg. Hist. of the LMRDA, P. 1103.)

The intensity of these comments is indicative of the climate in which the Congress considered and adopted Title I of the Labor Management Reporting and Disclosure Act. Although there was vigorous debate as to many aspects of the proposed legislation, no member of Congress ever so much as suggested that the Act would not provide a remedy to union members who are subjected to a long siege of unemployment as a consequence of speaking out on union affairs.

c. The doctrine of exhaustion of internal remedies applies to Section 102 actions just as it does to actions for breach of the duty of fair representation. (NLRB v. Industrial Union of Marine Workers, 391 U.S. 416, 425-428 (1968); Detroy v. American Guild of Variety Artists, supra, 286 F.2d 75.) As indicated in Petitioner's discussion of the exhaustion doctrine as applied in the duty of fair representation context (see Section II C 1 c (1), supra), it is scarcely open to dispute here that Petitioner did all he was required to do by union rules. Moreover, in this context just as in the context of duty of fair representation actions, failure to pursue to the bitter end the union's specified internal procedures is excused when it would be essentially futile to do so. (Semancik v. UMW Dist. 5, 466 F.2d 144, 150-151 (3d Cir., 1972); Steib v. New Orleans Clerks' Local 1497, 436 F.2d 1101, 1106 (5th Cir., 1971); Fulton Lodge No. 2, International Assn. of Machinists v. Nix, 415 F.2d 212, 216 (5th Cir., 1969); Cefalo v. International District 50, UMW, 311 F.Supp. 946, 953 (D.D.C., 1970); Farowitz v. Association Musicians of Greater New York, Local 802, 241 F.Supp. 895, 906-908 (S.D.N.Y., 1965).)

d. The damages awarded by the jury, including the substantial punitive damages, are consistent with, and in fact tend to effectuate the federal policies articulated in Title I of the Labor Management Recording and Disclosure Act.



As we have seen, Congress has pursued a dual policy in correcting particular labor abuses, not only providing for public enforcement of the National Labor Relations Act but authorizing private enforcement of various other laws. The remedies allowed under a private enforcement action may vary considerably from those available to the Board. As already noted, the Board is authorized only to issue orders requiring those subject to its jurisdiction to cease and desist from committing unfair labor practices and to "take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." (§ 10(c).) The Board is not authorized to award punitive damages (see Republic Steel Corp. v. NLRB, 311 U.S. 7 (1940)) or compensation for anything but lost earnings, nor may it ordinarily award a sum to recompense the charging party for attorneys' fees or other extraordinary expenses. (Mead v. Retail Clerks, Local 839, 77 CCH Labor Cases, para. 11,114 (9th Cir., 1975); Tiidee Products, 194 NLRB 1234, 1236-1237 (1972).)

The remedies and damages allowable to a Title I plaintiff, in contrast, are broad and varied and are clearly intended to compensate him for all harm he has suffered. Since "the rights of all members of the union are threatened" in the event that a single "union member is disciplined for the exercise of any of the rights protected by Title I," and because a lawsuit thus benefits the entire union, the successful plaintiff is entitled to attorney's fees. (Hall v. Cole, supra, 412

U.S. 1, 8; see also McDonald v. Oliver, 525 F.2d 1217, 1226-1229 (5th Cir., 1976.) The decisions also recognize that union members who have been wrongfully denied the right to work are entitled to compensatory damages for loss of wages<sup>24/</sup> and for mental suffering and emotional distress.<sup>25/</sup>

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Ryan v. International Bhd. of Elect. Workers, 387 F.2d 778 (7th Cir., 1967); Kelsey v. Philadelphia Local 8, Theatrical Employees, 294 F. Supp. 1368, 1376 (E.D. Penn., 1968); Sands v. Abelli, 290 F. Supp. 677, 681 (S.D.N.Y., 1968).

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Simmons v. Avisco, 350 F.2d 1012, 1018-1020 (4th Cir., 1965); Talavera v. Teamsters, 351 F. Supp. 155, 158-159 (N.D. Cal., 1972). In Boilermakers v. Rafferty, 348 F.2d 307 (9th Cir., 1965) it was held that unless there was accompanying physical harm, no recovery could be awarded for emotional distress. Rafferty, taking a narrow view of the damages available under Title I, relied heavily upon early decisions holding that no attorneys' fees may be awarded under Title I. (Cf. Hall v. Cole, supra, 412 U.S. 1.) In any event, Petitioner did suffer physical injury as well as emotional distress as a result of Respondents' misconduct. Therefore, under Title I, Petitioner would be entitled to recover such damages notwithstanding the Rafferty rule.



Furthermore, the majority of the courts which have considered the question have allowed injured workmen to recover punitive damages as well, concluding that the "awarding of punitive damages in appropriate cases serves as a deterrent to those abuses which Congress sought to prevent." Boilermakers v. Braswell, supra, 388 F.2d 193, 199-200.<sup>26/</sup>

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See also Cooke v. Orange Belt Dist. Council of Painters, supra, 529 F.2d 815; Morrissey v. National Maritime Union, 397 F.Supp. 659, 669 (S.D.N.Y., 1975); Sipe v. Local Union No. 191, United Brotherhood of Carpenters, 393 F.Supp. 865, 871-872 (M.D. Penn., 1975); Patrick v. I. D. Packing Co., Inc., supra, 308 F.Supp. 821, 823-824; Sands v. Abelli, supra, 290 F.Supp. 677, 684-685; Farowitz v. Associated Musicals of Greater New York, Local 802, supra, 241 F.Supp. 895, 909. Contra, supra, Burris v. International Bhd. of Teamsters, supra, 224 F.Supp. 277, 280-281. It is noteworthy that while Title VII of the 1964 Civil Rights Act followed the lead of the National Labor Relations Act in authorizing only equitable "make-whole" remedies (see Van Hoomissen v. Xerox Corp., 368 F.Supp. 829, 835-838 (N.D. Cal., 1973)), punitive damages may be awarded "under certain circumstances" for a violation of Section 1 of the Civil Rights Act of 1866 (42 U.S.C. § 1981; see Johnson v. Railway Express Agency, 422 U.S. 454, 460 (1975); but see EEOC v. Detroit Edison Co., 515 F.2d 301, 308-309 (6th Cir., 1975) Petition for Cert. pending sub. nom. Stamps v. Detroit Edison Co., # 75-239).

One or two further observations are in order on punitive damages. In the present case, the jury awarded Petitioner \$7500 in compensatory damages for the emotional distress caused by Respondents' extreme and outrageous conduct. Additionally, the jury awarded, and the able trial judge upheld, punitive damages in the amount of \$175,000. In the Court of Appeal, Respondents assailed the award of punitive damages on the ground of excessiveness. (App. Op. Br., pp. 102-118.) The Court of Appeal never reached that issue because it believed Petitioner's entire claim to be preempted.

The punitive damages award is not nearly as disproportionate to the compensatory damages as Respondents would like it to seem. In addition to the harm for which Petitioner was actually compensated, he suffered a significant loss of wages over a two-year period. Due to the uncertain state of the law as a result of decisions like Borden, Perko and Lockridge, Petitioner refrained from seeking lost wages, and the jury was instructed that no lost wages could be awarded. (CT 102-114, 530; App 1-16, 41.) That Petitioner was damaged extensively but utterly denied compensation in this regard should be a highly significant factor in the consideration of any claim that the award of punitive damages was excessive.

Furthermore, no specific request or award for attorneys' fees was made below, although California courts, like this Court and other federal courts, subscribe to the theory that attorneys' fees are appropriately granted in lawsuits which benefit

all members of the plaintiff's class. (See Mandel v. Hodges, 54 Cal.App.3d 596, 619-624, 127 Cal.Rptr. 244 (1976); Hall v. Cole, *supra*, 412 U.S. 1; United Steelworkers v. Butler Manufacturing Co., 439 F.2d 1110, 1112-1113 (8th Cir., 1971).) This, too, is a relevant factor in determining whether the amount of punitive damages was inappropriate.

The conduct herein, as has been demonstrated, is within the core of union activity which Congress sought to regulate by enacting Title I of the Labor Management Reporting and Disclosure Act and by preserving parallel state common law remedies. A large award of punitive damages will sometimes be necessary to deter unlawful retaliatory conduct by union officials, and thus to assure full union democracy.<sup>27/</sup> The jury and the trial judge

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"Strong reasons of policy promote the use of exemplary damages to deter union officials from conduct designed to suppress the rights of members. . . The very basis for the existence of unionism in our society today is the promise of employment to those who desire to associate freely in order to obtain it. The right of the working man to the benefits of collective bargaining is too essential and valuable to be hindered, impeded and seriously damaged by irresponsible and dictatorial leaders whose dominance in any given situation

(con't p. 111)

determined that such an award was compelled here by the Respondents' egregious misconduct and that determination ought not to be lightly rejected. Because the misconduct was so protracted and so heinous, and because the compensatory damages claimed were so modest in comparison to what might have been awarded, there is nothing in the award of punitive damages which could offend federal policy. To the extent that Respondents' quarrel with the punitive damages award is based on state law, that is of course a matter for the Court of Appeal on remand.

27/ (con't)

does great disservice to the purpose and principles of unionism. . . Imposition of exemplary damages, when the requisite elements of malice, gross fraud, wanton or wicked conduct, violence or oppression are present, serves to achieve the deterrence they were designed to effect." (Fittipaldi v. Legassie, 18 A.D.2d 331, 239 N.Y.S. 2d 792, 796 (1963).)



III. IF THE AUTHORITY OF CALIFORNIA'S COURTS TO DEAL WITH THE KIND OF MISCONDUCT HEREIN INVOLVED IS PRE-EMPTED, THE QUESTION ARISES WHETHER THE RESULTING INJUSTICES ARE WARRANTED BY ANY SIGNIFICANT FURTHERANCE OF THE NATIONAL LABOR POLICY OR WHETHER, ON THE OTHER HAND, A REEXAMINATION OF THE PRE-EMPTION DOCTRINE IS IN ORDER

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If the instant case is pre-empted under the Garmon principle then the law cries out to be changed.

No one who has had to struggle with the pre-emption doctrine as it has developed in the area of labor relations law can avoid concluding that the Garmon principle, for all its claimed simplicity and universality, suffers serious failings as a rule of law, failings which have led to widespread criticism of the principle. (See, e.g., Cox, Labor Law Preemption Revisited, *supra*, 85 Harv. L. Rev. 1337; Bryson, A Matter of Wooden Logic: Labor Law Preemption and Individual Rights, *supra*, 51 Tex. L. Rev. 1037; Lesnick, Preemption Reconsidered: The Apparent Reaffirmation of Garmon, *supra*, 72 Col. L. Rev. 469; Hooton, The Exceptional Garmon Doctrine, *supra*, 26 Lab. L. J. 49; Note, Preemption of State Labor Regulations Collaterally

in Conflict with the National Labor Relations Act, 37 G. Wash. L. Rev. 132 (1968); Michelman, State Power to Govern Concerted Employee Activities, 74 Harv. L. Rev. 641 (1961).

As already suggested, in the kind of situation presented by the Garmon case (which involved an award of damages to an employer by a state court under state labor relations law for a union's use of arguably protected economic weapons in a recognitional dispute with the employer) the Garmon principle is indeed easy to apply and, except where the subject conduct is only arguably within the Act, it usually produces a proper result. (See Sections I A 4, I B 2 a (2), I B 2 b (3).)

But when the Garmon principle has been applied to fundamentally different situations, involving not the relationship between employer and union but the relationship between union and union member (see Lockridge, Borden and Perko), it has frequently yielded results which are difficult to justify in terms of fundamental fairness, for the Labor Board has unreviewable discretion to refuse even a clear case, and if a court declines to hear a case because the Board might take it, the individual worker can be left without a remedy. Moreover, in producing such results, Garmon has gone far beyond the basic purposes of the pre-emption doctrine, for state regulation of conduct which is largely unrelated to the process of employee self-organization and collective bargaining scarcely hampers implementation of the national labor policy, particularly where



state law does not purport to regulate labor relations as such. (See Sections I B 1 and 2, supra.)

In addition, the Garmon principle has lost much of its original simplicity in the context of member-union disputes. This is in part because of the development, already adverted to, of a number of judicial and legislative exceptions to the basic principle (see dissenting opinion of Mr. Justice White in Lockridge, supra, 403 U.S. at p. 309; Bryson, A Matter of Wooden Logic: Labor Preemption and Individual Rights, 51 Tex. L. Rev. 1037, 1040-1041; Hooton, The Exceptional Garmon Doctrine, Lab. L. J. 49; Section II A, supra) and in part because of the valiant but largely unsuccessful attempts of this Court to square some of the later cases (see Borden, Perko and Lockridge, supra) with the pre-Garmon decisions (see Gonzales, Laburnum and Russell, supra), which embodied different and possibly irreconcilable concepts of pre-emption, but which this Court was nonetheless unwilling to overrule. As a matter of fact, the exceptions to the Garmon doctrine in the area of member-union disputes have all but swallowed the rule. The uncertain extent of what remains of the rule in that area has confused both bench and bar and is so subject to manipulation by skillful pleaders and result-oriented judges that the outcome in many cases bears little relation to the merits. (See Bryson, A Matter of Wooden Logic: Labor Law Preemption and Individual Rights, supra, 51 Tex. L. Rev. at pp. 1045-1050.)

Finally, the most attractive of the claimed attributes of Garmon -- that its ostensibly simple formula provides a rule of decision for all cases -- has been exposed as illusory by this Court's decision in Teamsters Local 20 v. Morton, supra, 377 U.S. 252. Under Morton, it will be recalled, conduct which is clearly neither protected nor prohibited by the Act may still be foreclosed to regulation by the States if Congress focussed on such conduct but declined to prohibit it, at least where leaving such conduct unregulated was part of the balance Congress struck between the conflicting interests of unions, employers, employees and the public.

If Garmon is unsatisfactory as a rule of law in the present context, what are the alternatives?

One would be to resurrect Gonzales and exclude disputes arising out of internal union affairs from the operation of Garmon. This was the position of Justices Douglas and White in their dissents in Lockridge (403 U.S., pp. 302, et seq).

As Professor Cox has observed,

"[o]n the one hand, the membership clause may be an organizing tool, compelling employees to become union members, enriching the union treasury, and securing the union's

status as exclusive bargaining representative. But where the union is strong and its status secure, the chief consequence of union job control is to enhance the effectiveness of sanctions for breach of union discipline by depriving the individual of his job if he is expelled from the union. The section 8(a)(3) and (b)(2) restrictions outlawing the closed shop and prohibiting discharge under a union shop agreement unless membership is terminated for nonpayment of dues serve two purposes: (1) they afford a measure of protection for freedom of choice, thus entering the field of labor-management relations; and (2) they provide the individual victim of union discipline with protection in his job and a remedy for its loss if he is expelled for improper reasons or because of errors in procedure. The legislative history makes it plain that Congress realized that sections 8(a)(3) and (b)(2) enter the field of union-member relations.

"If all discharges pursuant to a union shop clause had their greatest effect on freedom of self-organization, the usual rule of preemption should apply even though the necessity of excluding state law is less than in labor disputes. But if all the cases were preponderantly concerned with procedural or

substantive abuse of the power of expulsion, there would be no reason for preemption and there would be good cause to follow the LMRDA policy of allowing states to provide remedies for a union's oppression of its members. In fact, the cases sometimes fall primarily in one category and sometimes in the other, and even a case that is preponderantly one of individual oppression may have collateral impact upon freedom of choice." (Cox, Labor Law Preemption Revisited, 85 Harv. L. Rev. at pp. 1373-1374.)

Professor Cox goes on to point out that allowing an employee expelled from his union and then discharged from his job to sue in court for both damages and reinstatement in the union cannot have any substantial impact upon either the balance of power between union and management or the effectiveness of the federal regulatory scheme. Moreover, such a lawsuit is likely to provide quicker and more reliable relief and will in any event obviate dual proceedings. (85 Harv. L. Rev. at p. 1376.) On that basis, Professor Cox argues that Gonzales should be rehabilitated and Lockridge overruled, although he would adhere to the results (if not the reasoning) in Borden and Perko, since those cases involved only lost earnings which the Board had the power to award. (85 Harv. L. Rev. at pp. 1375-1376.)



While Professor Cox does not directly address situations like the present one -- where job control is exercised upon a member by some means short of expulsion and results in damage other than or in addition to wage loss -- it is obvious that similar considerations dictate that lawsuits be permitted in such situations. Here, as in the case of actual expulsion, there is little likelihood of any serious effect on labor-management relations if a member lawsuit is permitted, and although there exists here no problem of dual proceedings, there is also no possibility of any relief from the Board, since emotional rather than economic harm was the basis of the lawsuit. The question of dual proceedings will, of course, arise in cases where both lost earnings and some other item of damage are claimed; the parallel between Gonzales and such cases will be even more precise.

Removing member-union disputes from the operation of the Garmon rule (except perhaps where the Board could and probably would do full justice) would accomplish several important objectives.

First and foremost, it would correct the serious injustices which occur under present law. Individual working men would no longer either be left without remedies or relegated to partial remedies available only at the unreviewable discretion of the Board.

Secondly, it would bring the law as applied into line with Congress' express intent as reflected in the provisions and the legislative history of the Labor-Management Relations Act. (See Sections I A 2 d, II B 2 c, supra.)

Furthermore, it would yield substantial dividends in the form of ease of judicial administration. That is of course what the Garmon principle was supposed to do, but far from simplifying pre-emption issues in the area of member-union suits, Garmon has spawned extensive litigation over the scope and reach of the several exceptions to the Garmon rule. If the Garmon principle were inapplicable in the first place, there would be no need constantly to wrestle with the many difficult issues inherent in the recognition of exceptions to Garmon. To the extent that any controls might prove necessary to preclude conflict between federal labor policy and the remedies developed by the courts to protect members from abuse by their unions, this could be accomplished by adjustments to the applicable substantive standards, as indeed it has already been accomplished with respect to suits for breach of the duty of fair representation (see, e.g., Vaca v. Sipes, supra, 386 U.S. at p. 193; Motor Coach Employees v. Lockridge, supra, 403 U.S. at pp. 297-301) and with respect to at least some state tort actions (see Linn v. Plant Guard Workers, supra, 383 U.S., at pp. 63-66). Moreover, it could be accomplished at no greater and probably a much lesser cost in judicial time and effort than the courts, including this Court, have



had to expend (and doubtless would be compelled to expend in the future) upon the pre-emption doctrine and its exceptions.

The chief disadvantage of simply limiting Garmon in the manner suggested above is that while such an approach would largely remedy the problems Garmon has caused in the area of member-union disputes, it would still leave unresolved various difficulties in the area of labor-management disputes. Among these is the risk that if a court declines to decide a case because the Board might exercise jurisdiction but the Board in fact refuses jurisdiction, the dispute will go undecided. (See Section I B 2 a (2), supra.) Another is the impossibility of obtaining a Board determination of whether conduct arguably protected is actually protected or not. (Ibid.) A third is that Garmon does not provide a complete resolution of pre-emption issues, for conduct which is neither protected nor prohibited may still be permitted by federal law and may thus be outside the regulatory power of the states. (See Section I B 2 d, supra.)

The answer to these difficulties lies in a new formulation of the pre-emption doctrine as applied to labor relations law, a formulation based on the principle enunciated in Teamsters Local 20 v. Morton, supra, 377 U.S. 252.

Professor Cox argues that since the national labor legislation was enacted against a backdrop of local laws creating rights of property, bodily

security and personality and preserving public order, health and welfare -- laws which apply to everyone regardless of his involvement or non-involvement in employee self-organization or collective bargaining -- the relevant inquiry when a rule of local law is invoked in a dispute arising in a labor relations context is not whether that rule might indirectly affect the federal scheme of labor relations law. Rather, assuming that the conduct is not in fact protected (in which case state regulation is clearly barred) the question is whether the local law or rule of decision is based upon an accommodation of the special interests of employers, unions, employees and the public in the process of employee self-organization and collective bargaining, such as has already been made by Congress in enacting the labor relations law. The expanded Morton principle would preclude state regulation of conduct subject to the labor laws where the state sought to reach its own accommodation of the same interests but not where the state's purposes were unrelated to labor relations as such.

The Morton approach envisaged by Professor Cox would require an initial determination that the conduct in question was not actually protected. This determination Professor Cox would allow the courts to make, precisely in order to avoid the problem of disputes with no forum willing to resolve them. (85 Harv. L. Rev. pp. 1361-1363, 1366-1367.)

If the conduct in question were determined not to be protected, the inquiry would then shift to the purposes underlying the rule of local law sought to be invoked. It might seem at first blush that such an inquiry would entail the same laborious process of "litigating elucidation" which this Court evidently eschewed in Garmon, but in fact the process would be, or could easily be made, essentially painless. As Professor Cox has pointed out (see 85 Harv. L. Rev. at pp. 1365-1368), virtually all of this Court's pre-emption decisions in the area of labor-management disputes (see Section I A 3, supra) are consistent with the Morton principle, and this Court could avoid the need to relitigate the fact situations involved in them simply by approving their results. Since these cases encompass many of the significant situations in which pre-emption problems are likely to occur, they should provide valuable guidelines in any future cases which may arise and render relatively uncomplicated the task of the lower courts in applying the new principle, not to mention the task of this Court in supervising its application. To the extent that prior decisions did not control future cases, Morton would embrace the best of both the pre-Garmon and post-Garmon worlds as a rule of decision. It would require an examination of policy considerations, such as characterized the pre-Garmon decisions (see Section I A 3, supra), an approach vastly superior to the mechanical application of an unvarying standard which may or may not produce a result consistent with the fullest realization of both state and federal interests. Moreover, it would provide a single

test -- as Garmon was intended to do but clearly does not -- for the full resolution of all pre-emption issues arising in the area of labor-management disputes.

In the context of member-union disputes, the Morton formula would visibly curtail the pre-emptive effect of the Labor-Management Relations Act. Perhaps the greatest change wrought by the new principle would lie in the express recognition of the broad exception for state tort law of general application which Petitioner has urged was impliedly recognized in Linn v. Plant Guard Workers, supra, 383 U.S. 53. (See Section II B 1, supra.) The body of state law typified by International Association of Machinists v. Gonzales, supra, 356 U.S. 617, would also be accorded full legitimacy, not just because the Labor Management Reporting and Disclosure Act so provides (although that is reason enough), but because an exception for such law is a logical corollary of Morton; for if the Labor-Management Relations Act at most only incidentally touches upon the relations between union members and their organizations, state law regulating those relations can hardly be deemed to involve an accommodation of the same interests Congress weighed in adopting the Act. The exception for actions brought directly under the Labor Management Reporting and Disclosure Act would of course remain by virtue of Congress' obvious intent that such actions not be deemed pre-empted. The exception for actions based upon the duty of fair representation, although it does not derive directly from the Morton principle



would survive for the reasons stated in Vaca v. Sipes, supra, 386 U.S. at pp. 180-186 and Motor Coach Employees v. Lockridge, supra, 403 U.S. at p. 301: namely, that the right to fair representation is too crucial, Board remedies for its breach are too limited and the possibility of conflict between the Board and the courts is too slight to bar legal relief. (See Bryson, A Matter of Wooden Logic: Labor Law Preemption and Individual Rights, supra, 51 Tex. L. Rev., at pp. 1063-1070.)

With this approach, as with the more cautious alternative of limiting Garmon, any conflict which may arise between national labor policy and remedies developed in the courts to protect union members may be resolved by adjustments to the applicable substantive standards. But because member-union and labor-management disputes are of such a fundamentally different nature, it is hardly to be anticipated that any serious conflicts will occur.

#### CONCLUSION

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The nub of Petitioner's position herein is that the Garmon principle, as extended by Borden, Perko and Lockridge to disputes between union members and their unions, attempts to protect the federal scheme of labor relations law from the merest possibility of interference by other bodies of law, at the frequent sacrifice of the

fundamental right of individual working men to fair treatment by their unions and in the face of compelling evidence that Congress neither feared any such possibility of conflict nor desired any such sacrifice of important rights. With no significant considerations of policy favoring its application to member-union disputes and every consideration of fairness opposed to such application, the Garmon doctrine should, at the very least, be narrowly construed in the context of internal union affairs and its exceptions broadly construed. Far better would be the confinement of Garmon to labor-management disputes, to which the principle was originally designed to apply, or better still its replacement with a principle more rational in its operation, like that announced in Morton. Under any of these approaches (if not indeed under existing law) the instant action would be within the clear jurisdiction of the California courts.

For the foregoing reasons, it is respectfully urged that the decision of the Court of Appeal be reversed and Petitioner's claim be held within the jurisdiction of the courts of the State of California.

Respectfully submitted,

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## APPENDIX A

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Section 7 of the Labor-Management Relations Act (29 U.S.C. § 157) provides as follows:

"Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158 (a) (3) of this title."

Section 8 of the Labor-Management Relations Act (29 U.S.C. § 158) provides in pertinent part as follows:

"(a) It shall be an unfair labor practice for an employer --

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title; . . .

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, employees eligible to vote in such election have noted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership

in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; . . . .

(b) It shall be an unfair labor practice for a labor organization or its agents --

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section or to discriminate against an employee with respect to whom membership in such

organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; . . . .

Section 301(a) of the Labor-Management Relations Act (29 U.S.C. § 185(a)) provides as follows:

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Section 101 of the Labor Management Reporting and Disclosure Act (29 U.S.C. § 411) provides in pertinent part as follows:

"(a)(1) Equal Rights.--Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization,

to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

(2) Freedom of Speech and Assembly--Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: Provided, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations. . .

(4) Protection of the Right to Sue--No labor organization shall limit the right of any member thereof to institute an action in any courts or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named

as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: Provided, That such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: And provided further, That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

(5) Safeguards against improper disciplinary action. -- No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

"(b) Any provision of the constitution and by laws of any labor organization



which is inconsistent with the provisions of this section shall be of no force or effect."

Section 102 of the Labor Management Reporting and Disclosure Act (29 U.S.C. § 412) provides as follows:

"Any person whose rights secured by the provisions of this subchapter [Title I] have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged Violation occurred, or where the principal office of such labor organization is located."

Section 103 of the Labor Management Reporting and Disclosure Act (29 U.S.C. § 413) provides as follows:

"Nothing contained in this subchapter shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal, or under the constitution and bylaws of any labor organization."

Section 603(a) of the Labor Management Reporting and Disclosure Act (29 U.S.C. § 523(a)) provides as follows:

"Except as explicitly provided to the contrary, nothing in this chapter shall reduce or limit the responsibilities of any labor organization or any officer, agent, shop steward, or other representative of a labor organization, or of any trust in which a labor organization is interested, under any other Federal law or under the laws of any State, and, except as explicitly provided to the contrary, nothing in this chapter shall take away any right or bar any remedy to which members of a labor organization are entitled under such other Federal law or law of any State."

Section 609 of the Labor Management Reporting and Disclosure Act (29 U.S.C. § 529) provides as follows:

"It shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this chapter. The provisions of section 412 of this title shall be applicable in the enforcement of this section."

Supreme Court, U. S.  
FILED

AUG 14 1976

MICHAEL RODAK, JR., CLERK

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1976

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No. 75-804

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JOY A. FARMER, Special Administrator  
of the Estate of Richard T. Hill,  
*Petitioner,*

v.

UNITED BROTHERHOOD OF CARPENTERS AND  
JOINERS OF AMERICA, LOCAL 25, *et al.,*  
*Respondents.*

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On Writ of Certiorari to the California Court of Appeal  
Second Appellate District

---

**BRIEF FOR RESPONDENTS**

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IN THE  
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---

On Writ of Certiorari to the California Court of Appeal  
Second Appellate District

---

**BRIEF FOR RESPONDENTS**

---

**OPINION BELOW**

The Superior Court wrote no opinion. The opinion of the Court of Appeal of the State of California is reported at 49 Cal.App. 3d 614, 122 Cal. Rptr. 722.



The opinion is reproduced as Appendix A to the Petition for a Writ of Certiorari. (Pet.A. 1-28)<sup>1</sup>

### JURISDICTION

The opinion and judgment of the Court of Appeal was filed on June 30, 1975. (See Pet.A. 1-28.) A timely Petition for Hearing in the California Supreme Court was denied without opinion on September 10, 1975. (See Pet.B. 1.) A timely Petition for Certiorari was filed in this Court on December 5, 1975. The Writ of Certiorari was granted on January 26, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3). Because Petitioner reserves the right to resist entry of judgment dismissing the complaint (Pet. 10, n. 5 and P. Br. 12, n. 7.), there is a substantial question whether the judgment below was "final" within the meaning of this provision. The issue of jurisdiction is discussed at pp. 21-27 *infra*.

### QUESTION PRESENTED

May a state court judgment in an action for intentional infliction of emotional distress stand consistent with the National Labor Relations Act where the

<sup>1</sup>"Pet." refers to the Petition for Certiorari. "P. Br." will refer to petitioner's brief in this Court. The four-volume record appendix in this Court will be cited as "A." preceded by the volume number; because volume IV consisting of exhibits is unpaginated, reference will be to the exhibit number. "Cl. Tr." refers to the Clerk's transcript in the court below, and "Rep. Tr." refers to the Reporter's transcript in the court below; the former contains formal documents and the latter is transcript of the trial, consisting of 12 volumes.

"crux" of the action is actual and threatened refusals to refer the plaintiff from a union hiring hall due to plaintiff's intra-union political opposition to the union business agent, and where the jury is instructed that the plaintiff has recovered from the defendant union back pay for such discrimination in a proceeding before the National Labor Relations Board, but that that agency lacks power to award damages for pain and suffering, medical expenses and punitive damages?

### STATUTES AND RULES INVOLVED

This case involves §§ 7, 8(a)(1), 8(a)(3), 8(b)-(1)(A), 8(b)(2) and 10(a), (b) and (c) of the National Labor Relations Act of 1935, as amended, 49 Stat. 449, *et seq.*, 61 Stat. 136, *et seq.*, 73 Stat. 519, *et seq.* It also involves 28 U.S.C. § 1257(3) and Rules 23(1)(c) and 23(1)(f) of this Court. These provisions are reproduced in Appendix A *infra*.

### STATEMENT OF THE CASE

#### A. PROCEEDINGS IN THE DISTRICT COURT

##### 1. The Complaint

The original Complaint was filed on April 17, 1969 by Richard T. Hill, referred to as "Hill", against the United Brotherhood of Carpenters and Joiners of America, Local 25, referred to as "Local 25", the Los Angeles County District Council of Carpenters, referred to as "The District Council", and the United Brotherhood of Carpenters and Joiners, referred to as "United Brotherhood", and individual defendants who were business agents from time to time of Local 25 identified as Earl George Daley, Benjamin Fenwick,

Joseph Wilk, James Keane, and Kenneth Scott. (IA. 1).<sup>2</sup>

A first Amended Complaint was filed by Petitioner on March 7, 1972, (IA. 1-16) stating four causes of action. The first four paragraphs of the first cause of action identified the parties, alleged that at all times "each of the Defendants was the agent and employee of each of the remaining Defendants and was \* \* \* acting within the purpose and scope of said agency and employment." Paragraph 5 alleged that Plaintiff "was \* \* \* a journeyman carpenter and member in good standing" in each of defendant labor organizations, and that he "has duly sought and exhausted all of his remedies provided for in the constitutions and/or by-laws of the aforesaid organizations." (IA. 2-3).

Paragraphs 6 and 7 alleged the existence of a Master Labor Agreement between the carpenters' union and contractors, and set forth in detail provisions of the Agreement to hiring and dispatching procedures of the Union. Paragraph 8 alleged that he signed the out-of-work list and requested work, but the defendants refused to dispatch him and engaged in discriminatory practices by refusing to dispatch him or dispatching him to short or less desirable jobs. Paragraph 9 alleged that the reason for defendant's discriminatory action was that he was a member of an opposing union faction. Paragraph 10 alleged that the "intentional

<sup>2</sup> Mr. Hill, the original petitioner, died intestate on January 28, 1976, and an uncontested motion to substitute Joy A. Farmer as special administratrix of his estate was granted by this Court. We shall follow the form of petitioner's brief in using the term "petitioner" to refer to Hill, who will also from time to time be described as "plaintiff."

and wrongful discriminatory conduct practiced by defendants caused him to suffer a nervous breakdown, grievous mental anguish and bodily injury making him lame, sore and sick" and that he incurred medical expenses; he claimed \$500,000 compensatory damages. Paragraph 11 alleged that the foregoing acts "were committed deliberately and maliciously" and sought \$500,000 punitive damages. (IA. 4-9).

The second cause of action (which alone went to trial, see p. 7 *infra*) realleged paragraphs 1, 2, 3, 4, 5, 10, and 11 of the first cause of action described above. The second cause of action did *not* reallege paragraph 6 of the first cause of action which pleaded the collective bargaining agreement between the carpenters' unions and contractors, or paragraphs 7-9. The additional allegations of the second cause of action were as follows:

### 13.

"During the aforesaid period Defendants, and each of them, made repeated oral threats to Plaintiff to the effect that as long as they controlled the job-dispatching procedures that Plaintiff would be and he was given inferior assignments and be bypassed for work assignments. During the same period, as aforesaid, Defendants, and each of them, repeatedly threatened Plaintiff with actual or de-facto expulsion from the union in retaliation for his political activities, and further threatened to deprive Plaintiff of his ability to earn a living as a carpenter.

"Defendants, and each of them, knew or reasonably should have known or expected that their outrageous conduct, threats, intimidation, and words would result in severe emotional, mental and physical damage to Plaintiff." (IA. 9-10).

14.

"Defendants, and each of them, intentionally caused, or recklessly disregarded the probability that said conduct would cause Plaintiff to suffer grievous mental and emotional distress as well as great physical damage to Plaintiff making him sick, sore and lame and causing Plaintiff a nervous breakdown requiring Plaintiff to be hospitalized." (IA. 10).

The prayers for compensatory and punitive damages in paragraphs 15 and 16 respectively repeated *in haec verba* paragraphs 10 and 11. (IA. 10-11).

The third cause of action realleged the first six paragraphs of the first cause of action and alleged that Hill was a dues paying member and a third party beneficiary of the collective bargaining agreement that defendants breached the Agreement by failing to dispatch him in accordance with the Agreement and claimed general damages just as in paragraph 10; no punitive damages were sought on this contract claim. (IA. 11-13).

The fourth cause of action realleged paragraphs 1 through 6 of the first cause of action, claimed a breach of the agreement and further alleged that Hill joined Local 25 and paid dues and was entitled to receive the benefits of the hiring procedures under the Carpenter's Hiring Hall procedures and that defendants breached his membership agreement by failing to follow these procedures. He again claimed general damages as in paragraph 10, but no punitive damages. (IA. 13-15).

## 2. The Demurrer, The Rulings Thereon, and Further Pre-Trial Proceedings

On April 4, 1972 defendants filed a demurrer to the First Amended Complaint (IA. 16-18). With respect to the Second Cause of Action the demurrer stated:

"3. The Second Cause of Action set forth in the Complaint does not state facts sufficient to constitute a cause of action.

"4. The Court has no jurisdiction of the subject matter of the Second Cause of Action in that the matter is exclusively within the jurisdiction of the National Labor Relations Board and the federal courts." (IA. 17).

The demurrers to the other causes of action were identical.

On May 12, 1972, the Superior Court sustained the demurrer to the first, third and fourth causes of action of the first amended complaint, but it overruled the demurrer to the second cause of action, relying on *Alcon v. Ambro Engineering*, 2 Cal. 3d 493, a case in which no jurisdictional issue had been raised. (IA. 19).

*Hill did not at any time appeal the Superior Court's ruling sustaining the demurrers to the first, third and fourth causes of action.*

The defendants thereupon answered the second cause of action, setting forth denials and an affirmative defense which reiterated their jurisdictional objection. (IA. 20-21).



### 3. The Evidence at Trial.

We accept the Court of Appeal's statement<sup>3</sup> of the evidence which the plaintiff produced at trial:

At trial, Hill produced evidence from which the jury could conclude that Daley was business agent of Local 25, that Daley dispatched members of Local 25 to job sites on work assignments, that Hill was vice president of Local 25 during the period 1955-1968, that he had certain disputes and disagreements with Daley, that in January 1967, while he (Hill) was unemployed and on the out of work assignment list of Local 25, he was by-passed in assignment, that he complained to Daley and was told to go complain to Council, that he was a "jerk, knothed, idiot" and that he should go to another Local union, that he had other disputes with Daley concerning a credit union established by Local 25 and expenses incurred by Daley, that Daley dispatched other carpenters to work assignments ahead of him and he complained to Daley on the dispatching procedures, that Daley told him he would sit on the bench until "hell freezes over." Hill testified that other Union officials (Wilk and Fenwick) treated him the same way, that he told Daley he would file with the National Labor Relations Board (N.L.R.B.). Hill produced evidence that certain job site employers requested that he (Hill) be assigned to their jobs, but Local 25 assigned other union members.

Hill testified that he filed charges with Council about Daley's dispatching procedures but that the executive board of Council dismissed the charges. Hill admitted

<sup>3</sup> In order to conserve space we shall not set this lengthy statement out in the form of a quotation. The footnotes are our own.

that he was given some work assignments but he was also given other assignments where the work was non-existent. On other assignments the type of work was unsatisfactory and he refused to accept it.

Hill testified that he ran for the office of President of Local 25 on the ground that Daley was a drunken fool, a disgrace to the union and corrupt and that he was discriminating in running the hiring hall. Hill testified that in 1967 he filed a charge with the N.L.R.B. on the Dinwiddie-Simpson construction job (Crocker Citizens Bank Building), alleging discriminatory assignment and that in November 1968, the N.L.R.B. found that there had been discrimination and the notice of discrimination from the N.L.R.B. which the N.L.R.B. required be posted "in a conspicuous place for 60 days" was buried by Daley on the window of one of the inner office where nobody would see it.

Hill testified that he and Daley never engaged in any fight or struck any blows but that on one occasion Daley invited him to "go out in the street and fight." The invitation was apparently not accepted. Hill called Daley as an adverse witness and examined him at great length as to his work assignment practices.

Hill also produced evidence that Daley prevented him from performing his official duties as vice president of the union, that Daley would not let him preside in the absence of the President because Daley claimed that he (Hill) was inadequate, that Daley ridiculed him and insulted him before other union members, that Daley urged him to leave the union, that Daley threatened him, that Daley threatened to starve him by refusing work assignments, that Daley fabricated a dispatch slip in order to place Hill's name

at the bottom of the out-of-work list from which assignments were made, that Daley interfered with his unemployment insurance benefits by telling the state agency that Hill had refused work assignments, that Daley would assign him to jobs which he was not qualified for and "just can't handle" which was contrary to union rules and regulations which allowed members to classify themselves regarding their work capabilities, that Daley refused to honor employers' specific requests for Hill, that he was threatened and intimidated because he filed charges with the N.L.R.B., that an agent of Council told 250 union members "... a brother ran down to the [N.L.R.B.] and there's no brother going to extract money from this Union and stay in it," that Daley dispatched him to short jobs only—the Ruane Job, 35 hours; the Burke job, 0 hours; the Weymouth-Crowell Job, 2 days; the Spear Job, 2 days—during which period there were 108 job opportunities on which other members were assigned, that Daley fabricated a dispatch of Hill to the Steel Form Company job which Hill allegedly refused, when in reality Hill received no such assignment. This was done in order to place Hill's name at the bottom of the job assignment list.

Hill claims that the totality of this evidence "constitutes an intentional infliction of severe emotional distress." Hill produced medical evidence regarding his alleged damages.<sup>4</sup> (Pet. A. 6-8).

<sup>4</sup> However, Hill's own medical witness, Dr. DeJohn, testified that there was no record in Hill's medical reports or history of work problems and that all the factors including work, diet, heavy drinking and smoking contributed to his symptoms. [Rep. Tr. pp. 1855-1866.] He testified that Hill stated in his history that he had never seen a psychiatrist [Rep. Tr. p. 1871], but tes-

The Court of Appeal also said:

The defendants produced substantial evidence<sup>5</sup> that employers did not request or want Hill on various jobs, that Hill had refused to work on various jobs, that Hill talked too much on the job, that he interfered with the work on various jobs, that Hill called Daley a drunken bum and then the two often drank and played poker together.

Wilk testified that he frequently drank with Hill and Daley, that he offered Hill various work assignments which Hill refused, that Hill called him a "dumb Polack" and would blow smoke in his face. (Pet. A. 9).

\* \* \*

The dominant feature of the trial was plaintiff's effort to prove that Hill had been discriminated against in the operation of the union's hiring hall procedures because of Daley's animosity toward him, growing out of their intraunion political rivalry. To that end, plaintiff conducted an elaborate investigation into the operation of the hiring hall. In his opening statement to the jury Hill's attorney described Local 25's dispatching procedure in great detail and outlined that

tified that based on the report of a Dr. Thompson (who examined Hill earlier on an industrial injury case) (Def. Ex. X), a psychiatrist did diagnose Hill as suffering from "hypochondria". [Rep. Tr. pp. 1871-1872.] He testified that it was Hill's decision to be hospitalized [Rep. Tr. p. 1882], and that based on the records Hill was a heavy drinker, smoked heavily, took stimulants that caused his problem and there was nothing in his records relating to work problems. [Rep. Tr. pp. 1885-1887.]

<sup>5</sup> For example, Leo Poundstone testified that he was a construction superintendent and that in January or February 1969, Hill came to a job site and asked him why he was not hiring from the out-of-work list of Local 25; that he told Hill to leave the job site and Hill said to him "I don't know how a son of a bitch like you lives without getting shot". (IIIA. 580-585).



Hill intended to prove that he was discriminated against concerning dispatching of jobs, being dispatched to inferior jobs while other members of the union were allowed to "sneak in", and that he was sent on short jobs. (IA. 77-88, 91-93). He also discussed the Dinwiddy-Simpson job and reviewed the proceedings before the Labor Board.

Hill called Ken Scott, the current business agent of Local 25, to give an extensive description of the dispatching procedures of the hiring hall, including signing in, dispatching "sneak ins", requests, rehires, and job transfers. Scott also testified concerning the types of documents used by Local 25 on job referrals, out-of-work lists, and request forms. Many were put into evidence as exhibits. (Rep. Tr. pp. 244-290). On redirect, Scott was again questioned on procedures concerning signing lists, "sneak ins", rejecting referrals and staffing when a carpenter who was referred refuses a job. (Rep. Tr. pp. 430-442). Hill also called the defendant Daley. He was questioned at length regarding the hiring procedures of Local 25 concerning the out-of-work list, the referral system, the picking up of less than 16 hours of work, the signing of the out-of-work list, the stamping if a carpenter refused a dispatch on two jobs. (IIA. 274-288).

There was an enormous amount of evidence concerning the general pattern of the operation of the hiring hall. Hill had Daley select random names of carpenters on the out-of-work list to compare whether such carpenters' dispatch was dispatch by request or by some form of discrimination. The random names were selected on no relationship to Hill's claim. (IIA. 288-361, 371-395). Hill introduced exhibits involving dispatch slips and reviewed the requests and out-of-work

lists with Daley and specified individual carpenters. The out-of-work lists contained hundreds of names of carpenters and Hill would name carpenters who were dispatched without regard to any acts of discrimination. (IIIA. 401-547). He attempted to show that there was an over-all pattern of discrimination and in effect was putting the Local 25 dispatching procedures on trial and was not specifically limited to testimony as to individual acts of discrimination against Hill. (*Id.*).

Hill's attorney testified (by interrogating himself) regarding out-of-work records that he had examined for 1967, 1968 and 1969 (IIA. 204-208, Rep. Tr. 1102-09).

Hill introduced 102 Exhibits of which the following related directly to the employment practices of Local 25 and involved the overall dispatching procedures of the union. Most of the Exhibits did not directly involve Hill, but were the basis for his counsel's argument to the jury that Local 25 was engaged in a practice of job discrimination involving many carpenters and to urge it to award damages (particularly punitive damages) to punish the union for its overall hiring practices. The Exhibits referring to general employment practices are the following:

Exhibits 1, 2, 3, 4, 5, 7, 8, 16, 18, 19, 20, 21, 22, 23, 26, 27, 28, 29, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 79, 80, 82, 83, 84, 85, 95, 96, 98 and 99.

Many of the numbered exhibits actually contained dozens of separate documents; samples of these exhibits are reproduced in Vol. IV of the Appendix in order that the Court may appreciate the nature of the case plaintiff presented to the jury.



Plaintiff introduced into evidence, in support of his demand for punitive damages, forms submitted by the defendant unions to the Department of Labor showing their financial condition (LM-2). With respect to Local 25 the form placed in evidence was that for the fiscal year July 1, 1971 to June 30, 1972, which showed a gross income of \$289,490.00. This income consisted primarily of dues from members in the amount of \$229,379.00. The cash disbursements for the same fiscal year for Local 25 were \$311,363.00. The cash disbursements consisted of per capita tax, salaries, expenses of officers, supplies, operation of the union office and other purposes. There was a *net deficit* for the fiscal year in the amount of \$21,873.00. Local 25 showed fixed assets in the amount of \$410,942.00. The primary asset is the union building, valued at \$306,374.00.

The LM-2 of the District Council was that for the fiscal year July 1, 1969 to June 30, 1970. It showed total cash receipts in the amount of \$457,361.00 of which \$341,067.00 was membership dues. The District Council disbursed \$401,613.00 leaving a net income for the fiscal year of \$55,648.00. It had total assets of \$552,046.00. The primary assets are the union building, valued at \$381,287.00, and cash in the amount of \$169,032.00.

#### **4. The Court's Instructions to the Jury, Its Verdict and the Judgment Thereon.**

Even as the trial related primarily to discrimination in the operation of the hiring hall, so did the Court's instructions. The following are pertinent to the present case:

"In this action, the plaintiff has the burden of establishing by a preponderance of the evidence all

of the facts necessary to prove the following issues:

1. The defendants intentionally and by outrageous conduct inflicted upon plaintiff severe emotional distress
2. That the said conduct of the defendants was the proximate cause of injury and damage to the plaintiff and
3. The nature and extent of the injuries and damages claimed to have been so suffered." (I A. 34.)

\*                      \*

"There has been received in evidence the fact that Plaintiff filed a complaint within the National Labor Relations Board, a governmental agency, and received an award covering wages he would have earned on the Dinwiddy-Simpson job had he been dispatched on May 1, 1967.

The National Labor Relations Board is empowered by law to render awards to compensate for lost wages where it finds that a claimant was unreasonably denied employment in violation of certain applicable federal laws.

The Plaintiff in this action charges the intentional infliction [sic] of severe emotional distress and seeks damages for pain and suffering, for resulting medical expenses incurred, and for punitive damages. The National Labor Relations Board has limited jurisdiction which does not include the authority to render awards for any of the just-mentioned items of damage." (*Id.* 41-42.)

\*                      \*                      \*

"If you find that Plaintiff has suffered actual damage as a proximate result of the acts of Defendants on which you base your finding of liability, you may in your sole discretion award additional damages against Defendants as punitive or

exemplary damages, for sake of example and by way of punishing Defendants if, and only if, you find by a preponderance of the evidence that said Defendants have been guilty of oppression or actual malice.

The law provides no fixed standard as to the amount of such punitive damages, but leaves the amount to the jury's sound is [sic] discretion, exercised without passion or prejudice." (*Id.* 48-49.)

\* \* \*

The Court refused to give the following instructions requested by the defendants:

"In determining whether the Plaintiff has satisfied the burden of proof regarding liability of any defendants in this case, you are not to consider any evidence regarding discrimination concerning employment opportunities or hiring either on the basis of the general dispatching procedures of the Defendants Carpenters Union Local 25, or its business agents, or regarding any operation of the dispatching procedures concerning the Plaintiff." (*Id.* 60.)

\* \* \*

"In determining whether the Plaintiff has satisfied the burden of proof, you are not to consider the general procedures and practices of the hiring hall of Carpenters Union Local 25, or any of its business agents. The only evidence you are to consider are evidence relating to the Plaintiffs individually regarding the alleged act of discrimination concerning his employment." (*Id.* 61.)

The jury returned a general verdict in the amount of \$7500 general damages and \$175,000 punitive damages against the present petitioners, Local 25, the District Council, and Daley. It found in favor of two of

the remaining individual defendants.<sup>6</sup> The Court entered judgment on the verdict (I A. 68-69).

#### B. Proceedings in the California Appellate Courts.

Defendants appealed to the California Court of Appeal. Putting aside all other grounds, the Court of Appeal sustained appellants' position "that the federal government has preempted this field and the state courts have no jurisdiction, that jurisdiction to right the alleged wrong is vested in the N.L.R.B." (Pet. A-9). The Court "regard[ed] four cases as controlling: *San Diego Unions v. Garmon*, 359 U.S. 236; *Plumbers' Union v. Borden*, 373 U.S. 690; *Iron Workers v. Perko*, 373 U.S. 701; and *Motor Coach Employees v. Lockridge*, 403 U.S. 274." (*Id.*) The Court drew from these cases the principle that the "'crux' of the action," \* \* \* "the conduct on which the suit is centered, whether described in terms of tort or contract" determines whether the suit is within the jurisdiction of the state court (Pet. A-21, A-22, quoting *Borden*, 373 U.S. at 697-698, this Court's emphasis). The Court of Appeals determined that despite other evidence adduced by petitioner,<sup>7</sup> "the 'crux' of the action concerned Hill's employment. The conduct on which the suit is

<sup>6</sup> The United Brotherhood and two individual defendants had previously been dropped from the case. The unidentified employers referred to in the complaint were never served.

<sup>7</sup> "It is true that in the case at bar that Hill complained of incidental conduct which might not directly involve his employment, such as the fact that Daley used abusive language, called Hill foul names and that Daley invited him outside on one occasion for a fight. Also that Daley advised the state unemployment insurance people that Hill had refused work assignments and was therefore not eligible for unemployment benefits. It is undoubtedly true that there was bitter animosity between the two men which was reflected in a variety of ways." (A-21)



'centered' is conduct which is within the Board's exclusive primary jurisdiction to apply federal standards" (A-22, emphasis in original). The Court added:

"The fact that in the case at bar Hill sought damages for mental anguish should not change the result here any more than such a claim for mental anguish changed the result in *Borden, supra* and *Lockridge, supra*. It is the 'crux' of the causes of action, the 'conduct' which is complained of which controls whether federal or state courts have jurisdiction, not the type of damage which is caused by such conduct.

In the case at bar we are not required to speculate whether or not the wrongs which Hill complains of were 'arguably' within the jurisdiction of the N.L.R.B. Here the N.L.R.B. did in fact assume jurisdiction, it did find that Local 25 was guilty of unfair labor practices in making work assignments of Hill in the Dinwiddy-Simpson job for the construction of the 'Crocker Citizens Bank' building and awarded Hill \$2,517 back wages for discriminating conduct with reference to that job. Hill filed other charges of unfair labor practices with the N.L.R.B. but voluntarily withdrew them.

We presume that the N.L.R.B. would have correctly decided the additional matters and would have granted the relief, if any, to which Hill was legally entitled if Hill had pursued the matter further before the N.L.R.B. But Hill was apparently dissatisfied with the award of \$2,517 from the N.L.R.B. and sought the more generous bounties of a common law jury. Such an approach might have been permissible under *Weber v. Anheuser-Busch, Inc.*, [348 U.S. 468] but that concept was repudiated by *Local No. 207 v. Perko, supra*, wherein the U. S. Supreme Court said if the union conduct is 'arguably' within the jurisdiction of the N.L.R.B., state jurisdiction is pre-

empted even though state jurisdiction may award greater relief than would be awarded by the N.L.R.B.

Here there is no doubt in our view that the 'crux' of the conduct of the defendants complained of by Hill related directly or indirectly to his employment and work assignments. The key allegation of his complaint was that the defendants 'made repeated oral threats to the effect that as long as they controlled job dispatching procedures that [Hill] would be *and he was given* inferior 'assignments and be bypassed for work assignments.' (Emphasis ours.) That he was threatened with actual and *de facto* expulsion in 'retaliation for his political activities' and defendants 'further threatened to deprive [Hill] of his ability to earn a living as a carpenter.' That 'as a proximate result of the intentional and wrongful *discriminatory conduct*' (emphasis ours) Hill suffered certain damages." (Pet. A-23-A-24)

The Court also fully understood the importance of a nationally uniform remedial policy:

"In both *Borden* and *Lockridge* the plaintiff sought damages for emotional and mental distress. As we have already stated, in each instance the U.S. Supreme Court in effect held that that was not determinative, that the determinative factor was the 'areas of conduct' not the type of damage that is inflicted as a proximate result of the conduct. The very purpose of having one uniform national policy administered by a single specially constituted tribunal would be completely frustrated and defeated if it were legally permissible for juries in the fifty different state tribunals to award different amounts of damage for conduct which is essentially within the jurisdiction of the N.L.R.B. A labor union could be completely wiped out financially by such awards resulting in substan-



tial detriment to other innocent union members whose livelihood depends upon continued union representation. A collusive action with such a result is not beyond the realm of possibility. If the award of damages by the N.L.R.B. is inadequate for any reason, the remedy lies with the federal government, not by resort to the tribunals of the fifty different states. Hill seeks to distinguish *Borden, supra*, and *Perko, supra*, on the ground that each case involved a single act of unfair labor practice rather than a course of conduct which is what is involved in the case at bar. We regard this as a difference without legally significant distinction. We are cited to no authority that holds that N.L.R.B. jurisdiction is limited to single acts of unfair labor practice and that it has no jurisdiction of a course of conduct.

For purposes of illustration only we note that under section 187 of the Labor Management Act (29 U.S.C.A.) Congress did expressly reserve to the injured party causes of action for damages in U.S. District Court "or in any other court having jurisdiction of the parties' resulting from an unfair labor practice under section 158(b)(4) (secondary boycotts). If the Congress had intended to allow the fifty different states power to award damages for the type of action arising out of the unfair labor practices alleged in the case at bar, it would have been an extremely simple matter to enlarge the provision of section 187 to encompass such actions." (Pet. A-25-A-26).

The Court refused to pass on the allegations raised in the three other causes of action: "Since Hill does not appeal from the judgment we will treat the legal problems as if only cause of action II had been filed." (Pet. A-2).

Having "conclude[d] that the trial court herein was without jurisdiction and that jurisdiction was vested

in the N.L.R.B.", the Court reversed the judgment of the Superior Court "with instructions to render judgment for the defendants and dismiss the action" (Pet. A-28). The Supreme Court of California denied plaintiff's petition for hearing (Pet. B-1).

#### THE JUDGMENT BELOW IS NOT FINAL

The State Court of Appeal reversed the judgment in plaintiff's favor "with instructions to render judgment for the defendants and dismiss the action" (Pet. A. 28). The California Supreme Court denied hearing. It would appear on its face, therefore, that the judgment of the state court is final, and that this Court's jurisdiction under 28 U.S.C. § 1257(3) was properly invoked. At one time, this Court took the view that finality was to be determined solely from the face of the judgment, *Houston v. Moore*, 3 Wheat. 433; *Bruce v. Tobin*, 245 U.S. 18; see Stern & Gressman, *Supreme Court Practice* (Fourth ed., 1969), p. 94. Now, however, this Court examines "both the judgment and the opinion as well as other circumstances which may be pertinent" in resolving the issue of finality" (*Gospel Army v. Los Angeles*, 331 U.S. 543, 548). In the present case there are pertinent other circumstances, for petitioner has advised this Court that the litigation in the state courts was not terminated by the Supreme Court's denial of a hearing. In his petition for certiorari he said:

"Judgment was never entered with respect to the other causes of action. Their present status is a matter of continuing dispute, but that fact does not affect this Petition." (Pet. 10, n. 4.)

This statement is repeated *in haec verba* in his brief on the merits (P. Br. 12, n. 7). Petitioner does not

explain the nature of the "continuing dispute", but this clearly appears from the position that he took in his Petition for Hearing in the Supreme Court of California.

Petitioner there contended that the Court of Appeal had erred in ruling "that the judgment on Petitioner's second cause of action was a judgment as well on the other causes of action,"<sup>8</sup> so that "the fact is inescapable that the decision of the Court of Appeal is void and that the case is still pending in the trial court and will so remain until a proper judgment is entered."<sup>9</sup> In the Supreme Court of California he presented alternatives for eliminating this supposed jurisdictional defect, culminating in the offer that he would be prepared to stipulate that the record on appeal be treated as a petition for mandamus and the Supreme Court would be able to reach the merits, "provided that the entire case, including the order sustaining the demurrer to his first, third and fourth causes of action, were to be deemed before the Court for full review."<sup>10</sup> Petitioner then informed the Court of "the consequences if this Court does not grant hearing in order to remedy this jurisdictional defect":<sup>11</sup>

*"Although the Court of Appeal's decision is in fact a nullity, remittitur will issue and Respondents will seek entry of judgment as mandated by the decision. (Opinion, p. 30.) Petitioner will resist entry of any such judgment and will seek entry of a single appealable judgment on*

<sup>8</sup> Plaintiff's Petition for Hearing in the Supreme Court of California, p. 10.

<sup>9</sup> *Id.*, pp. 10-11.

<sup>10</sup> *Id.*, p. 12.

<sup>11</sup> *Id.*

all causes of action, in order to secure review of the ruling on the demurrer. *That much is certain.* It cannot be predicted, of course, what the trial court will do in the face of such conflicting demands, nor can it be predicted precisely what the losing party will do, but it would not be unreasonable to expect a flurry of petitions for extraordinary relief, directed not only to the Court of Appeal but to this Court. It is difficult to believe that Petitioner's position will not ultimately prevail and his right to review of the ruling on the demurrer not be recognized, but such additional proceedings would be onerous to all parties and wasteful of the time and efforts of the Courts."<sup>12</sup>

Thus, petitioner put the Supreme Court of California, and of course the defendants, on notice that if that court denied him a hearing he would resist the entry of judgment in the trial court and would vigorously litigate his right to review the orders sustaining the demurrer to the three other causes of action arising out of the dispute between plaintiff and the defendants. And, by his statement that the "controversy" is "continuing", petitioner has put this Court on notice that it is "certain" that he will resist the entry of judgment, and that there will be protracted "additional proceedings" in the state courts. This is fair enough, for while it seems clear to us that petitioner's efforts in the state court would and should be unsuccessful, neither we, nor this Court, can keep him from trying.

To be sure, if petitioner had chosen to discontinue the controversy as to the status of his first, third and fourth causes of action, and had accepted the decisions

<sup>12</sup> *Id.*, emphasis added.



of the California state courts as the final disposition of his action, no jurisdictional obstacle to this Court's review would exist.<sup>13</sup> But when petitioner elected to retain the other three strings to his bow, he destroyed the finality of the judgment, which he must establish in order to invoke and maintain this Court's jurisdiction under 28 U.S.C. § 1257(3). Interestingly, petitioner did not, either in his Petition or his brief, assert that the judgment is, in fact, final, although he "of course, has the burden of affirmatively establishing this Court's jurisdiction" (*Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 70-71; *Memphis Natural Gas Co. v. Beeler*, 315 U.S. 649, 651). And while, if nothing appeared to put finality in doubt, the invocation of jurisdiction with citation to 28 U.S.C. § 1257(3) would be taken as a sufficient representation that the judgment below is final, petitioner's own reservation of a right to continue the litigation in the State courts would nullify such a claim even if it had been made expressly.<sup>14</sup>

<sup>13</sup> Of course, if petitioner had said nothing, and had, after a decision by this Court, sought to reinstate the three other causes of action, he would have been met not only with our objections under state law, but also the contention that he is estopped from reopening the case by the representation that the judgment is final which would have been implicit in his unqualified invocation of this Court's jurisdiction.

<sup>14</sup> In *Pope v. Atlantic Coast Line R. Co.*, 345 U.S. 379, the Court accepted the petitioner's "concession that his case rests upon his federal claim and nothing more" and on that basis determined that despite the Georgia Supreme Court's remand for other proceedings, the judgment was final (*id.* at 382). See also *Mills v. Alabama*, 384 U.S. 214, 217-18. The present case presents the converse situation. Whereas on the face of the judgment of the Court of Appeal, the proceedings in the state court are over, what petitioner has told this Court makes plain that far more "remains to be done [than] the mechanical entry of judgment by the trial court" (345 U.S. at 382).

It cannot consistently be maintained 1) that a state court judgment is final, 2) that "the case is still pending in the trial court" and 3) that the judgment of which review on the merits is sought is a "nullity" for procedural reasons. Moreover, in *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 67-68, Mr. Justice Frankfurter, while acknowledging that "[n]o self-enforcing formula defining when a judgment is 'final' can be devised", articulated certain "[t]ests" which "are helpful in giving direction and emphasis to decision from case to case" and which plainly govern this one:

"Thus, the requirement of finality has not been met merely because the major issues in a case have been decided and only a few loose ends remain to be tied up—for example, where liability has been determined and all that needs to be adjudicated is the amount of damages. *Bruce v. Tobin*, 245 U.S. 18; *Martinez v. International Banking Corp.*, 220 U.S. 214, 223; *Mississippi Central R. Co. v. Smith*, 295 U.S. 718. On the other hand, if nothing more than a ministerial act remains to be done, such as the entry of a judgment upon a mandate, the decree is regarded as concluding the case and is immediately reviewable. *Board of Commissioners v. Lucas*, 93 U.S. 108; *Mower v. Fletcher*, 114 U.S. 127."

Here, according to plaintiff, more than a "few loose ends remain to be tied up". While we believe—and shall insist in the state courts—that the defendants are entitled to an entry of judgment in their favor, there is nothing that we could do to prevent plaintiff from pursuing his announced intention to resist the entry of such judgment. Thus, it cannot be said that the entry of judgment on the Court of Appeal's mandate would be "nothing more than a ministerial act."



Indeed, plaintiff says quite the opposite: it "is certain" that he will resist "entry of any such judgment \* \* \*" (see pp. 22-23 *supra*) and thereupon a new round of litigation will commence.

We recognize that in recent years this Court, while adhering to the basic principles of the finality requirement, has subjected it to certain exceptions, which were categorized in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469.

What was said in *Cox*, however, makes it even more plain than it had been before, that compliance with the finality requirement cannot be excused in the present case. The Court there said:

"There are now at least four categories of such cases in which the Court has treated the decision on the federal issue as a final judgment for the purposes of 28 U.S.C. § 1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts. In most, if not all, of the cases in these categories, *these additional proceedings would not require the decision of other federal questions that might also require review by the Court at a later date*, and immediate rather than delayed review would be the best way to avoid the mischief of economic waste and of delayed justice, *Radio Station WOW, Inc. v. Johnson, supra*, at 124, as well as precipitate interference with state litigation." (*Cox Broadcasting Corp.*, 420 U.S. at 477-478, footnote omitted, emphasis added.)

Petitioner has not asserted that he fits into any of these categories. Indeed, an examination of the proceedings which plaintiff contemplates shows that "the remaining litigation may raise other federal questions that may later come here" so that "to allow review of an

intermediate adjudication would offend the decisive objection to fragmentary reviews" (see *Radio Station WOW v. Johnson*, 326 U.S. 100, 127, approved on this point in *North Dakota Pharmacy Bd. v. Snyders' Stores*, 414 U.S. 156, 163). For the very issue which petitioner intends to raise in the state courts if he successfully resists the entry of judgment is that the trial court erred as a matter of federal law in dismissing his other causes of action.

If this Court affirms, leaving the judgment of the Court of Appeal intact, petitioner would resist entry of judgment thereon. His object, of course, is to revive the federal questions which were decided adversely to him when the demurrers on counts 1, 3 and 4 were sustained. If the trial court adhered to its original ruling, he would then pursue that federal question on appeal through the California courts, and, if he failed there, would seek to return to this Court. Moreover, if any of those three claims were reinstated for trial, the federal jurisdictional issues would survive until a judgment on the merits, and the additional proceedings could well give rise to further federal questions.

### INTRODUCTION AND SUMMARY OF ARGUMENT

The allegations made in the plaintiff's second cause of action, the cause that went to the jury, and that resulted in a general verdict in his favor, sound in the state tort law of intentional infliction of emotional distress. But the evidence adduced by the plaintiff at trial focussed on alleged discrimination in job referrals from the union hiring hall against the plaintiff and other union members who opposed the incumbent officers, and on threats thereof. See pp. 8 to 13, *supra*. As the National Labor Relations Board demonstrates in its brief *amicus curiae* and appendix thereto the plaintiff's presentation in its major particulars was indistinguishable from any of scores of presentations made by the Board's General Counsel in § 8(b)(2) proceedings before that agency. Indeed, the plaintiff to prove his state tort case relied in part on a Board decision, stemming from a charge he had filed, holding that he had been discriminated against in referrals to the Dinwiddy-Simpson job in violation of § 8(b)(2).

In *San Diego Unions v. Garmon*, 359 U.S. 236, 244 this Court held

"When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield."

And, in *Plumbers Union v. Borden*, 373 U.S. 690, the Court applied the *Garmon* rule in holding that Texas' authority to entertain a suit brought pursuant to Texas tort law for "wilful, malicious and discriminatory interference" with the right to contract on the theory

that the defendant union had refused to refer Borden to a job because of union membership considerations, was preempted.

### I.

In Part I of this brief we show that the *Borden* case is this case. Here too, "the conduct called into question" (373 U.S. at 694) was union discrimination in the operation of a hiring hall, and the alleged discrimination was based on union "membership" in the broad sense of that term established in *Radio Officers v. Labor Board*, 347 U.S. 17, 39-42, and followed in *Borden*.

We show also that this case is not within the *Machinists v. Gonzales*, 356 U.S. 617 exception to *Garmon*. In 1947 Congress expressly and deliberately left unregulated the internal affairs of unions. Union interference with employment rights, on the other hand, was minutely regulated in § 8(b)(2). Following the line of demarcation drawn by Congress, this Court has distinguished between cases the crux of which is alleged job discrimination—as to which the Board does have jurisdiction and the state courts therefore do not—and cases such as *Gonzales*—which focus on the loss of membership rights which the Board can not regulate and as to which the states do retain jurisdiction.

Petitioner also relies on *Linn v. Plant Guard Workers*, 383 U.S. 53. But, as we demonstrate, that case undermines his position. While petitioner argues that the states have jurisdiction to award remedies other than those provided by federal law, *Linn* accepts the predicate of *Borden* and *Garmon* that it is the nature of the conduct in question that determines whether the state's jurisdiction is preempted. The



*Linn* Court did not mention the nature of the state relief available until it had completed its analysis of whether state regulation of libelous speech would be inconsistent with the federal labor policy. And, while petitioner argues that the NLRA does not preempt state tort law of general application, *Linn* holds that the states may not enforce their defamation law against non-malicious libels uttered in the course of a labor dispute.

Petitioner would now have it that state court jurisdiction may be affirmed on the basis of the exceptions to *Garmon* for actions based on the duty of fair representation or on the Labor Management Reporting and Disclosure Act. We conclude Point I by establishing that the single question presented deals only with petitioner's claim that his state tort claim was not preempted and that his present reliance on these two federal claims is not fairly comprised within that question. Nor has petitioner met the requirements of Rule 23(1)(f) which require him to state when and how he raised the fair representation and LMRDA issues below or shown that the disposition below did not rest on an adequate state ground. Finally we note that this case does not involve an abstract debate as to whether petitioner's bare pleadings were sufficient. A trial has been had and the question is whether these two issues were presented to the jury after defendant was put on notice that petitioner was relying on them. On the record here that question can only be answered in the negative. Plaintiff's effort to reverse the jury's verdict on distinct theories which were not tried and on which it was not instructed is wholly impermissible.

## II.

Petitioner asks that this case be decided on the basis of *Teamsters Union v. Morton*, 377 U.S. 252, rather than on the basis of *Garmon*. We believe that *Garmon* should be followed, because it accords with Congressional judgments made in 1935 and 1947, and because the rule there stated was consciously ratified by Congress in 1959. In any event, we show that petitioner would not be entitled to prevail even under *Morton*.

*Morton* establishes that state laws which conflict with the federal remedial scheme may not stand, any more than can state statutes which conflict with the NLRA's substantive provisions. The Court held that since Congress allowed only compensatory damages for violations of § 303 (identical to violations of § 8(b)(4)) punitive damages could not be awarded for violation of state law by the same conduct (*id.* at 260-261). That holding controls this case. The jury was invited to determine liability and/or assess damages on the basis of the precise unfair labor practice which the NLRB had already remedied by a back pay award in excess of \$2500 (together with the usual cease and desist and notice posting requirements). The jury was instructed that it could award damages supplementing that back pay award for that conduct although, as the instruction clearly stated, the Board was without authority to award damages for medical expenses, pain and suffering or punitive damages. It is such supplementation of federal remedies for unfair labor practices by state remedies, including punitive damages, for exactly the same conduct, which *Morton* held to be an impermissible conflict. The policy, embodied in § 10(c), that there should be no punitive damages for violations of



§ 8, is older than and equally strong as, the identical policy embodied in § 303.

We trace the decisions which elaborate the § 10(c) policy, the fullest of which is *Republic Steel Corp. v. Labor Board*, 311 U.S. 7, 10-12. The Court there said in part:

"... We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act.

\* \* \*

"In that view, it is not enough to justify the Board's requirements to say that they would have the effect of deterring persons from violating the Act. That argument proves too much, for if such a deterrent effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to that end."

What Congress has forbidden the Board from doing, the States may not do either.

## ARGUMENT

### I. THE STATE COURT WAS WITHOUT JURISDICTION OVER PETITIONER'S CLAIM BASED ON DISCRIMINATION AGAINST HIM IN THE OPERATION OF A HIRING HALL.

#### A. *Plumbers' Union v. Borden*, 373 U.S. 690, Establishes that This Case Is Beyond State Jurisdiction Because the Union's Conduct Is "Subject to Labor Board Cognizance".

The jury was permitted, indeed invited, to award damages to petitioner on the ground that there had been union discrimination against him in the operation of the hiring hall, due to his opposition to Daley, the union's business agent, and Daley's policies. As the court below held, the state courts are without jurisdiction to award damages based on such conduct, which is clearly within the competence of the National Labor Relations Board to redress. *Plumbers' Union v. Borden*, 373 U.S. 690 ("Borden") is directly in point and dispositive.

In *Borden* the plaintiff was a member of the Plumbers Local in Dallas, Texas. He obtained an opportunity to work for a construction company, but was refused a job referral from the local union.

After the plaintiff was refused the job referral, he filed suit against the Local Union and the International Union seeking damages under Texas state law for the refusal to dispatch him and alleged that the acts of the Plumbers Union constituted "willful, malicious and discriminatory interference with his right to contract and pursue a lawful occupation". The Texas court allowed the case to go to the jury, which found that there was job discrimination and awarded damages for loss of earnings, mental suffering and punitive

damages. The Texas court disallowed the recovery for mental anguish and ordered a remittitur on punitive damages that were in excess of the amount of actual damages. The Texas Appellate Court affirmed the judgment.

This Court reversed. In his opinion for the Court Mr. Justice Harlan first summarized the governing principle:

"This court held in *San Diego Building Trades Council v. Garmon*, 359 U. S. 236, that in the absence of an overriding state interest such as that involved in the maintenance of domestic peace, state courts must defer to the exclusive competence of the National Labor Relations Board in cases in which the activity that is the subject matter of the litigation is arguably subject to the protections of § 7 or the prohibitions of § 8 of the National Labor Relations Act. This relinquishment of state jurisdiction, the Court stated, is essential 'if the danger of state interference with national policy is to be averted,' 359 U. S., at 245, and is as necessary in a suit for damages as in a suit seeking equitable relief. Thus the first inquiry, in any case in which a claim of federal preemption is raised, must be whether the conduct called into question may reasonably be asserted to be subject to Labor Board cognizance."<sup>15</sup>

Justice Harlan then undertook this "first inquiry" which is identical to that to be undertaken in the present case:

"The facts as alleged in the complaint, and as found by the jury, are that the Dallas union business agent, with the ultimate approval of the local union itself, refused to refer the respondent to a

<sup>15</sup> *Id.*, at 693-694, footnote omitted.

particular job for which he had been sought, and that this refusal resulted in an inability to obtain the employment. Notwithstanding the state court's contrary view, if it is assumed that the refusal and the resulting inability to obtain employment were in some way based on respondent's actual or believed failure to comply with internal union rules, it is certainly "arguable" that the union's conduct violated § 8(b)(1)(A), by restraining or coercing Borden in the exercise of his protected right to refrain from observing those rules, and § 8(b)(2), by causing an employer to discriminate against Borden in violation of § 8(a)(3). See, e. g., *Radio Officers v. Labor Board*, 347 U. S. 17; *Local 568, Hotel Employees*, 141 N.L.R.B. 29; *International Union of Operating Engineers, Local 524 A-B*, 141 N.L.R.B. No. 57. As established in the *Radio Officers* case, the 'membership' referred to in § 8(a)(3) and thus incorporated in § 8(b)(2) is broad enough to embrace participation in union activities and maintenance of good standing as well as mere adhesion to a labor organization. 347 U.S., at 39-42. And there is a substantial possibility in this case that Borden's failure to live up to the internal rule prohibiting the solicitation of work from any contractor was precisely the reason why clearance was denied. Indeed this may well have been the meaning of the business agent's remark, testified to by Borden himself, that 'you have come in here wrong, you have come in here with a job in your pocket.'

It may also be reasonably contended that after inquiry into the facts, the Board might have found that the union conduct in question was not an unfair labor practice but rather was protected concerted activity within the meaning of § 7. This Court has held that hiring-hall practices do not necessarily violate the provisions of federal law, *Teamsters Local v. Labor Board*, 365 U.S. 667,



and the Board's appraisal of the conflicting testimony might have led it to conclude that the refusal to refer was due only to the respondent's efforts to circumvent a lawful hiring-hall arrangement rather than to *his* engaging in protected activities. The problems inherent in the operation of union hiring halls are difficult and complex, see Rothman, *The Development and Current Status of the Law Pertaining to Hiring Hall Arrangements*, 48 Va. L. Rev. 871, and point up the importance of limiting initial competence to adjudicate such matters to a single expert federal agency.

"We need not and should not now consider whether the petitioner's activity in this case was federally protected or prohibited, on any of the theories suggested above or on some different basis. It is sufficient for present purposes to find, as we do, that it is reasonably 'arguable' that the matter comes within the Board's jurisdiction."<sup>10</sup>

The *Borden* case is this case. Here too, "the conduct called into question" (373 U.S. at 694) was union discrimination in the operation of a hiring hall, and the alleged discrimination was based on union "membership" in the broad sense of that term established in *Radio Officers v. Labor Board*, 347 U.S. 17, 39-42, and followed in *Borden*. Indeed, in this case not only is the union's conduct "reasonably asserted to be subject to Labor Board cognizance" (373 U.S. at 694), it was *demonstrated* to be subject to Board cognizance by petitioner's successful filing of a charge with the Board arising out of the discriminatory failure to

<sup>10</sup> *Id.* at 694-696, footnotes omitted, emphasis in original. In a separate part of the opinion Mr. Justice Harlan rejected Borden's contention that the state courts had jurisdiction under *Machinists v. Gonzales*, 356 U.S. 617. The same contention is made by petitioner here, and this aspect of the *Borden* holding is discussed at pp. 41-51 *infra*.

refer him to the Dinwiddie-Simpson job; the jury was actually instructed, over defendants' objection, that the Board had entered an award in plaintiff's favor covering the wages he would have earned on that job. See p. 15, *supra*.

In discussing whether this case comes within the *Garmon* principle (as opposed to one of the exceptions acknowledged therein, see pp. 41-60 *infra*), petitioner does not discuss the majority opinion in *Borden* at all. And while his discussion of the *Garmon* principle is lengthy, he attempts to differentiate the facts of this case from *Borden* in only two ways.

He argues first: "To begin with, it is clear beyond cavil that the misconduct herein was not protected under Section 7 of the Labor-Management Relations Act (P. Br. 41). This statement assumes the answer to the issue which was most vigorously and extensively litigated at the trial, whether there was "misconduct" in the operation of the hiring hall and if there was, its extent. The jury determined the "misconduct" issue against the defendants in this case; that was the result in *Borden* as well. But Mr. Justice Harlan did not indulge in the circular reasoning of giving weight to the result reached by the jury in determining whether the jury was authorized to decide the question in the first place. *Borden* squarely holds that since the Board might find the union operation to be "protected concerted activity within the meaning of § 7," and particularly because of the difficulty and complexity of the problems inherent in assessing the operation of a hiring hall, "initial competence to adjudicate such matters" must be left "to a single expert federal agency" (373 U.S. 695-696). This case is identical to *Borden* in this particular; the lengthy trial



of this issue only confirms Justice Harlan's characterization, "difficult and complex". On this ground alone, the verdict of the jury may not stand.

Plaintiff next misstates the facts in order to avoid the "prohibited" or "arguably prohibited" branch of the *Garmon-Borden* analysis. For, he asserts: "It should be clear, moreover, that much of the misconduct, and perhaps the greater part of it, could hardly have been in mere reprisal for Petitioner's political opposition to Daley" (P. Br. 50). This is belied by petitioner's own Statement of the Case: "Petitioner's opposition to Daley and to Daley's policies triggered a campaign of intimidation directed at Petitioner (and sometimes at those seen associating with him) by Daley and those effectively under Daley's control." (*Id.* 6). The remainder of the respective paragraphs at P. Br. 50-51 and *id.* 6 are likewise totally at odds. And even if one could read the record to show that Daley's hostility to Hill was purely personal, despite the way the case was tried, it is incontrovertible that the jury was permitted to find the respondents' liable if it found that Hill's "opposition to Daley and Daley's policies" (P. Br. 50-51) was the basis of discrimination against him in the operation of the hiring hall. Thus, the general verdict may have been for conduct which was clearly subject to the jurisdiction of the Board. It follows that petitioner's observation that discrimination in hiring was not the only *form* of "misconduct" with which Hill charged Daley, and on theory of *respondeat superior* principles, the union (P. Br. 39-49, 50), avails him nothing, for it is settled that a general verdict may not stand if it *may have been based* on any factor which the jury was not entitled to consider. See, *e.g.*, *Stromberg v. California*, 283 U.S. 359, 368; *New York Times*

*v. Sullivan*, 376 U.S. 254, 283; *Bachellar v. Maryland*, 397 U.S. 564, 570-571; *Letter Carriers v. Austin*, 418 U.S. 264, 281-282.

In sum, as the case went to the jury, the verdict could have been based in whole or in part on conduct identical to that in *Borden*, and the result reached in that case must be reached here as well.

There is moreover in this case a fact which was absent in *Borden*, and which renders it impossible for plaintiff to argue that the jury was not permitted to impose liability and damages on the basis of conduct which was prohibited by § 8 of the Act. For petitioner's case was directed *inter alia* to proving discrimination against him on the Dinwiddy-Simpson job, as to which the Labor Board had found that the union committed a violation of §§ 8(b)(1)(A) and 8(b)(2) by refusing to refer petitioner. To nail this point home, and to get the full benefit of the Board's finding, petitioner requested and obtained an instruction informing the jury that Hill had filed a charge with the Board, that he received an award covering the wages that he would have earned on the Dinwiddy-Simpson job, that the Board is empowered to render such awards to compensate for lost wages "where it finds that a claimant was unreasonably denied employment in violation of certain applicable federal laws," and that the Board cannot grant "damages for pain and suffering, for resulting medical expenses incurred, and for punitive damages," the additional award sought by plaintiff. (I A. 41-42, quoted at p. 15, *supra*).

Since petitioner has already recovered over \$2500 against Local 25 in a Labor Board proceeding on precisely this theory which he now challenges, this argu-

ment is subject to the familiar and manifestly just doctrine of preclusion against inconsistent positions.<sup>17</sup> Indeed, the argument impeaches the very verdict which petitioner is attempting to sustain, because at his insistence the jury was instructed that the

“National Labor Relations Board is empowered by law to render awards to compensate for lost wages where it finds that a claimant was unreasonably denied employment in violation of certain applicable federal laws.” (IA. 42)

If that instruction was wrong and the Board was not empowered to so decide, the verdict cannot stand because both in determining liability and in assessing damages, the jury may have been influenced by the Board's determination of liability. That obviously was plaintiff's purpose in requesting the instruction. In any event, *Borden* demonstrates that the contention is wholly untenable. It is beyond legitimate dispute that “the conduct called into question” by petitioner's claim, as it went to the jury, “may reasonably be asserted to be subject to Labor Board cognizance” and that the state courts were therefore without jurisdiction (*Borden*, 373 U.S. at 694).

<sup>17</sup> “A plaintiff who has obtained relief from an adversary by asserting and offering proof to support one position may not be heard later in the same court to contradict himself in an effort to establish against the same adversary a second claim inconsistent with his earlier contention. Such use of inconsistent positions would most flagrantly exemplify that playing ‘fast and loose with the courts’ which has been emphasized as an evil the courts should not tolerate. . . . And this is more than an affront to judicial dignity. For intentional self-contradiction is being used as a means of obtaining unfair advantage in a forum provided for suitors seeking justice.” *Scarano v. Central R. Co. of New Jersey* (C.A. 3) 203 F.2d 510, 513.

See generally 1B Moore's *Federal Practice*, ¶ 0.405[8], pp. 765-773.

## B. The “Peripheral Federal Concern” Exception Is Inapplicable.

Petitioner argues also that this case “is squarely within the exception for matters of only peripheral federal concern but vital local concern” (P. Br. 54, heading). In this connection he relies on *Machinists v. Gonzales*, 356 U.S. 617 (“Gonzales”), discussed at P. Br. 63-83, and *Linn v. Plant Guard Workers*, 383 U.S. 53 (“Linn”), discussed at P. Br 56-63.

### 1. *Machinists v. Gonzales*

The Court of Appeal held that this case was not within the *Gonzales* exception to *Garmon* but was governed by *Borden*, *Perko* and *Lockridge* (Pet. A. 27). The Court of Appeal was clearly right, in light of this Court's explanation of the critical difference between *Gonzales* and the subsequent cases.

The second major issue discussed and decided in *Borden* was the applicability of the *Gonzales* exception in a case where the gravamen of the plaintiff's action was the refusal to refer him out of a union hiring hall. Once again, it is hardly necessary to do more than quote the Court's opinion in *Borden*. Justice Harlan summarized the *Gonzales* facts by noting that the complainant there had been “expelled [from his union] in violation of his contractual rights and \* \* \* was seeking restoration of membership [; h]e also sought consequential damages flowing from the expulsion, including loss of wages resulting from loss of employment and compensation for physical and mental suffering” (373 U.S. at 696). He then stated:

“The *Gonzales* decision, it is evident, turned on the Court's conclusion that the lawsuit was focused on purely internal union matters, i.e., on re-



lations between the individual plaintiff and the union not having to do directly with matters of employment, and that the principal relief sought was restoration of union membership rights. In this posture, collateral relief in the form of consequential damages for loss of employment was not to be denied.

We need not now determine the extent to which the holding in *Garmon*, 359 U.S. 236, *supra*, qualified the principles declared in *Gonzales* with respect to jurisdiction to award consequential damages, for it is clear in any event that the present case does not come within the *Gonzales* rationale. The suit involved here was focused principally, if not entirely, on the union's actions with respect to Borden's efforts to obtain employment. No specific equitable relief was sought directed to Borden's status in the union, and thus there was no state remedy to 'fill out' by permitting the award of consequential damages. The 'crux' of the action (*Gonzales*, 356 U.S. at 618) concerned Borden's employment relations and involved conduct arguably subject to the Board's jurisdiction." (*Id.* at 697)

On the same day the Court also distinguished *Gonzales* in *Iron Workers v. Perko*, 373 U.S. 701. What the Court said with respect to *Perko*'s case is applicable *in haec verba* to Hill's:

"As in *Borden*, the crux of the action here concerned alleged interference with the plaintiff's existing or prospective employment relations and was not directed to internal union matters. Indeed the state court itself observed that 'Plaintiff is not attempting to secure any redress for loss of rights as a member of the union.' \* \* \*. Thus there was no permissible state remedy to which the award of consequential damages for loss of earnings might be subordinated." (373 U.S. at 705.)

In *Motor Coach Employees v. Lockridge*, 403 U.S. 274, after reviewing *Gonzales*, *Borden* and *Perko* at length (*id.* at 294-296), the distinction was reaffirmed:

"In sum, what distinguished *Gonzales* from *Borden* and *Perko* was that the former lawsuit 'was focused on purely internal union matters,' *Borden, supra*, at 697, a subject the National Labor Relations Act leaves principally to other processes of law." (*Id.* at 296.)

The Court pointed out that whereas in *Gonzales* potential interference with the federal regulatory scheme was "tangential and remote" because the case turned on the interpretation of the union constitution, in *Lockridge* "the possibility was real and immediate" because his case "turned upon the construction of the applicable union security clause, a matter as to which \* \* \* federal concern is pervasive and its regulation complex" (403 U.S. at 296). The operation of a hiring hall is surely no less complex.

In light of the foregoing it is altogether extraordinary that petitioner should find it "obvious that *Borden*, *Perko* and *Lockridge* are hardly distinguishable from *Gonzales* on the basis that *Gonzales* focusses upon purely internal affairs while they do not, and that they touch upon employment relations while *Gonzales* does not" (P. Br. 67). That, as we have seen, is precisely the distinction which the Court did draw, and that line of demarcation follows the path Congress took in 1947.

The internal affairs of unions were expressly and deliberately left unregulated by the Taft-Hartley Act, as attested to by the proviso to § 8(b)(1)(A) to which the *Borden* opinion expressly drew attention, 373 U.S.



at 697, n. 8. Union interference with employment rights, on the other hand, was minutely regulated by § 8(b)(2) and thereby placed under the NLRB's aegis. Congress' purpose was to place unions under legal restraints comparable to those placed on employers in 1935 where, as is the case when a union has a voice in hire or discharge, Congress viewed the union position to be equivalent to that of an employer. The identity is made manifest by the language of § 8(b)(2), which incorporates § 8(a)(3). This Court's definitive statement as to § 8(b)(2)'s meaning is set out in *Radio Officers v. Labor Board*, 347 U.S. 17, 39-40, which as we have seen, was followed by the Court in *Borden*. Of particular importance is the following portion of the opinion:

"But the scope of the phrase 'membership in any labor organization' is in issue here. Subject to limitations, we have held that phrase to include discrimination to discourage participation in union activities as well as to discourage adherence to union membership.

Similar principles govern the interpretation of union membership where encouragement is alleged. The policy of the Act is to *insulate employees' jobs from their organizational rights* [citing § 7 of the Act]. Thus §§ 8(a)(3) and 8(b)(2) were designed to allow employees to freely exercise their right to *join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood.*" (*Id.* at 39-40, footnotes omitted, emphasis added.)

In complete disregard of the position he took at trial, where he relied on the Board law, Petitioner now argues:

"[E]ven though the Board has interpreted the Act as authorizing it to reach [referral discrimina-

tion], and even though the bare language of the Act might provide some support for the Board's position, the legislative history does not. \* \* \* Section 8(b)(2) was aimed essentially at the closed shop and to the extent that its terms seemed to go beyond prohibition of the closed shop, its proponents indicated only that the section was intended to reach union attempts to cause termination of an expelled member from a job he already possessed." (P.Br. 49-50.)

Petitioner's dramatic shift in position is wrong on the merits as well. His statement of the law is simply irreconcilable with this Court's interpretation of the term "membership" in *Radio Officers*.

The *Radio Officers* interpretation of § 8(b)(2) has, of course, been followed and the Board has, in innumerable cases, determined whether a union in its operation of a hiring hall has engaged in discrimination to encourage or discourage "membership" in this broad sense. See the cases cited and discussed in the NLRB Brief and the appendix thereto. It is difficult to imagine conduct more "plainly within the central aim of federal regulation" (*Garmon*, 359 U.S. at 244). We therefore think it would unnecessarily burden the Court for us to respond to petitioner's ill-disguised attack on *Radio Officers* (P. Br. 21-29), but two points are worth mentioning.

1) Petitioner draws a distinction between Board regulation of union conduct toward a member which causes his discharge and "union conduct toward a member which fell short of causing actual discharge from a job which he already possessed" (P. Br. 28). This distinction is plainly unten-

able. Section 8(b)(2) is designed to parallel § 8(a)(3); it makes it unlawful for a union "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3)"; § 8(a)(3) in turn forbids employer discrimination "in regard to *hire* or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization" (emphasis added). An effort to read "hire" out of this prohibition was made in *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177, and was decisively rejected (*id.* at 182-187). This Court's response to the further argument that the Board was without power to require an individual to be hired, although it could direct reinstatement, was met with a response which applies equally to petitioner's argument here: "To differentiate between discrimination in denying employment and in terminating it, would be a differentiation not only without substance but in defiance of that against which the prohibition of discrimination is directed" (*id.* at 188).

Thus, when Congress subjected unions to the same restrictions as employers it necessarily subjected union operated hiring halls to regulation. This Court's holding in *Teamsters Union v. Labor Board*, 365 U.S. 667, that the Board had overreached in laying down specific rules as to how union hiring halls were to operate, cannot remotely be read as casting any doubt on the Board's authority to prevent actual discrimination in the operation of such hiring halls for the purpose of encouraging membership; indeed, such authority was expressly recognized: " \* \* \* the Board is confined to determining whether discrimination has in fact been practiced" (*id.* at 677).

2) Petitioner's further contention that Congress did not contemplate that hiring hall discrimination against union members would be regulated by the Board (P. Br. 28-29) simply cannot be reconciled with *Radio Officers'* broad definition of "membership" and particularly with the overriding concern of §§ 8(a)(3) and 8(b)(2) to "insulate employees' jobs from their organizational rights" (347 U.S. at 40). It is significant that immediately after that statement the Court cited § 7 of the Act which, of course, declares the organizational rights under the Act. The broad interpretation of "membership" stated in *Radio Officers* is a corollary of a broad interpretation of organizational rights under § 7, and is necessary to protect those rights against a most serious form of infringement from the employees' standpoint, the loss of job rights or job opportunities.

The very facts of two of the cases decided in the *Radio Officers* opinion demonstrated that the member-nonmember distinction proffered by petitioner for determining the scope of the Board's authority is inconsistent with the Act. At the very outset of his statement of the cases which were there decided, Mr. Justice Reed observed that Frank Boston, the discriminatee in *NLRB v. International Brotherhood of Teamsters*, was "a member of Local Union No. 41, International Brotherhood of Teamsters, AFL" (347 U.S. at 24); and in *Radio Officers* he stated that the discriminatee William Christian Fowler [was] a member of the Radio Officers union \* \* \* (*id.* at 28). And in discussing the merits of Boston's case the Court held that his discharge was for union membership because its basis was that "he was delinquent in a union obligation. \* \* \* The union caused this dis-



crimination by applying a rule apparently aimed at encouraging prompt payment of dues" (*id.* at 42). It was on this ground that the Eighth Circuit's judgment in *Teamsters* was reversed.

The sum of the matter is that in 1947 Congress adopted a policy of *laissez faire* with regard to internal union affairs and of Board regulation with regard to union interference with job rights. The lessons to be drawn from what Congress did and what it chose not to do were summarized by Mr. Justice White in *Scofield v. NLRB*, 394 U.S. 423, 428-429:

"Based on the legislative history of section [8(b)(1)(A)], including its proviso, the Court in *NLRB v. Allis Chalmers Mfg. Co.*, 388 U.S. 175, 195, distinguished between internal and external enforcement of union rules and held that Congress did not propose any limitations with respect to the internal affairs of unions, aside from barring enforcement of a union's internal regulations to affect a member's employment status. A union rule, duly adopted and not the arbitrary fiat of a union officer, forbidding the crossing of a picket line during a strike was therefore enforceable against voluntary union members by expulsion or a reasonable fine. The Court thus essentially accepted the position of the National Labor Relations Board dating from *Minneapolis Star & Tribune Co.*, 109 NLRB 727 (1954) where the Board also distinguishing internal from external enforcement in holding that a union could fine a member for his failure to take part in picketing during a strike but that the same rule could not be enforced by causing the employer to exclude him from the work force or by affecting his seniority without triggering violations of §§ 8(b)(1), 8(b)(2), 8(a)(1), 8(a)(2), and 8(a)(3). These sections form a web, of which § 8(b)(1)(A) is only a

strand, preventing the union from inducing the employer to use the emoluments of the job to enforce the union's rules." (Footnotes omitted.)

Against this background it is clear that this case is indeed further removed from *Gonzales* than were *Borden*, *Perko* and *Lockridge*. Unlike *Borden* and *Lockridge*, Hill was not expelled or suspended from the union. And unlike *Borden*, *Perko* and *Lockridge*, Hill did not, in the cause of action that went to trial, assert any rights under the union constitution.

Thus, the proposition which the dissenting Justices in *Lockridge* drew from *Gonzales*, that improper internal union discipline and branches of union constitutions are left to the States to redress and that in so doing the States are permitted to deal with unfair labor practice issues also implicated (403 U.S. at 308 (Douglas, J. dissenting) and *id.* at 324 (White, J. dissenting)) is of no aid to Hill. For, aside from the fact that it has been twice rejected where the "crux" of the action concerns "existing or prospective employment relations" (see *Borden*, 373 U.S. at 697; *Lockridge*, 403 U.S. at 295-296), here the only action tried was concerned with employment relations, rather than the loss of any membership rights.

We therefore need not dwell for long on the three alternatives which petitioner proffers for placing *Borden*, *Perko* and *Lockridge* together on one side of the preemption line and *Gonzales* and this case on the other. The first distinction, with which he himself finds "problems" depends on a repetition of the contention that the issue in this case is not "particularly within the expertise of the Labor Board" and does



not involve a "risk of inconsistency between judicial resolution of the issue and the Board's resolution \* \* \*" (P. Br. 69). The NLRB cases summarized in the Board's brief, and those listed in the appendix thereto, provide a more than sufficient refutation.

The second distinction, "that the interference with existing or prospective employment relations in *Borden*, *Perko* and *Lockridge* was far more direct and immediate than in either *Gonzales* or this case" (P. Br. 71), while accurate as to *Gonzales* is, in respect to "this case" totally at variance with plaintiff's posture at trial. It quite escapes us how it can be said straightforwardly that a "continuing refusal to dispatch petitioner from the hiring hall" has a lesser impact on "actual or existing employment than a single failure to refer to an existing job" or not to involve "prospective employment in the sense that *Borden* did" (*id.*). Insofar as petitioner attempts to rationalize this attempted distinction, he simply reiterates "the fact", which *Borden*, *Perko* and *Lockridge* prove not to be a fact, "that regulation of [the] activity [here through § 8(b)(2)] cannot be regarded as central to the Act's purposes."

The third distinction introduces two errors. Petitioner says:

"A third distinction, turning not on the nature of the conduct involved but on the nature of the relief afforded, is that in *Borden*, *Perko* and *Lockridge* the damages awarded were for lost earnings alone, a form of relief the Board could have given, while in *Gonzales* the damages award, although including lost earnings, included as well a sum for mental suffering, which was clearly beyond the Board's power." (P. Br. 72)

This is incorrect on the facts because in *Borden* the Court awarded punitive damages and in *Perko* the Court awarded damages for prospective earnings; the Board provides neither remedy. More fundamentally, this Court squarely held in *Garmon* (and implicitly reiterated in *Borden*, *Perko* and *Lockridge*) that it is the nature of the activity regulated rather than differences in potential remedy which determines whether an action is within the exclusive jurisdiction of the Labor Board:

"We recognize that the opinion in *United Constr. Workers v. Laburnum Corp.*, 347 U.S. 656, found support in the fact that the state remedy had no federal counterpart. But that decision was determined, as is demonstrated by the question to which review was restricted, by the 'type of conduct' involved, i.e. 'intimidation and threats of violence.'" (359 U.S. at 247-248; see also the elaborate footnote appended thereto, *id.* at 248, n. 6.)

Indeed, this point was at the heart of the disagreement between the majority and the concurring Justices in *Garmon*. The difference in remedial schemes is itself a reason why concurring state jurisdiction is inconsistent with the Congressional intent. See Point II, *infra*.

## 2. *Linn v. Plant Guard Workers*.

*Linn v. Plant Guard Workers*, 383 U.S. 53, undermines, it does not support, petitioner's arguments against preemption based on the fact that California law provides remedies other than those Congress provided for § 8(b)(2) violations, and that the cause of action sent to the jury rested on a generally applicable tort law rather than on a labor relations statute.

a. The premise of the Court's discussion was that stated in *Borden* (373 U.S. at 694) and quoted approvingly in *Linn*:

"[I]n the absence of an overriding state interest such as that involved in the maintenance of domestic peace, state courts must defer to the exclusive competence of the National Labor Relations Board in cases in which the activity that is the subject matter of the litigation is arguably subject to the protections of § 7 or the prohibitions of § 8 of the National Labor Relations Act. This relinquishment of state jurisdiction . . . is essential 'if the danger of state interference with national policy is to be averted,' . . . and is as necessary in a suit for damages as in a suit seeking equitable relief. Thus the first inquiry, in any case in which a claim of federal preemption is raised, must be whether the conduct called into question may reasonably be asserted to be subject to Labor Board cognizance." (383 U.S. at 59-60)

The heart of the analysis is the following:

"Nor should the fact that defamation arises during a labor dispute give the Board exclusive jurisdiction to remedy its consequences. *The malicious publication of libelous statements does not in and of itself constitute an unfair labor practice.* While the Board might find that an employer or union violated § 8 by deliberately making false statements, or that the issuance of malicious statements during an organizing campaign had such a profound effect on the election as to require that it be set aside, it looks only to the coercive or misleading nature of the statements rather than their defamatory quality. The injury that the statement might cause to an individual's reputation—whether he be an employer or union official—has no relevance to the Board's function. Cf. *Amalgamated Utility Workers v. Consolidated*

*Edison Co.*, 309 U.S. 261. *The Board can award no damages, impose no penalty, or give any other relief to the defamed individual.*

On the contrary, state remedies have been designed to compensate the victim and enable him to vindicate his reputation. The Board's lack of concern with the personal injury caused by malicious libel, together with its inability to provide redress to the maligned party, vitiates the ordinary arguments for pre-emption." (383 U.S. at 63-64, footnotes omitted, emphasis added.)

Contrast the present case. While the malicious publication of libelous statements does not of itself constitute an unfair labor practice, the refusal to refer an individual out of a union hiring hall because of an intra-union dispute with a union official *does* constitute an unfair labor practice. While, because malicious libel is not an unfair labor practice, the Board cannot give *any* remedy to a defamed individual, Congress has through § 10(c) empowered the agency to remedy violations of § 8(b)(2), and of course Hill himself obtained such a remedy as the result of his charge of hiring hall discrimination.

The method of analysis used in *Linn* confirms that the nature of the remedy provided is not a touchstone for determining state jurisdiction; that was not one of the bases for determining that malicious libel is of "merely peripheral concern" of the Act. The relief available in the state court was discussed only after the Court had established that the conduct in question was not a § 8 violation. In this respect *Linn* is of a piece with *Gonzales*. In both cases state jurisdiction was premised on the fact that the conduct complained of was not an unfair labor practice. In both cases the availability of state court remedies was considered to



be a *consequence* of the determination that the state and not the Board had authority to determine whether a wrong had been committed, and not a cause for allowing jurisdiction. Thus, both cases are consistent with *Garmon* and *Borden*, and neither advances petitioner's cause.

In sum, on any view of the opinion what is critical for present purposes about *Linn* is its adherence to the rule stated in *Garmon* and followed in *Borden* that the nature of the conduct, other than violence,<sup>18</sup> is the touch-

<sup>18</sup> An additional element that led a majority of the Court to determine in *Linn* that suits for malicious libel are not preempted was acceptance of the analogy to *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656, and *Automobile Workers v. Russell*, 356 U.S. 634, and approved in *Garmon*, which held that the States may provide tort remedies for violent conduct in labor disputes, and may provide their normal tort remedies, including punitive damages therefor. As the Court said in *Linn*, "[i]n each of these cases the 'type of conduct' involved, i.e., 'intimidation and threats of violence,' affected such compelling state interests as to permit the exercise of state jurisdiction" (383 U.S. at 62, quoting *Garmon*, 359 U.S. at 248). The *Linn* majority "similarly conclude[d] that a State's concern with redressing libel is 'so deeply rooted in local feeling and responsibility' that it fits within the exception specifically carved out by *Garmon*" (383 U.S. at 62). See also *id.* at 64, n. 6. Thus, the Court in *Linn* drew the same lesson from *Garmon's* approval of the *Laburnum-Russell* line that we do—that this is but another instance of the proposition that "conduct called into question" is the touchstone of jurisdiction, see p. 52 *supra*, quoting *Borden*.

Moreover, the phrase "deeply rooted in local feeling and responsibility" is not a general catch-all for the state laws of torts. It is intimately related to the police power. *Allen-Bradley Local v. Wisconsin Emp. Rel. Bd.*, 315 U.S. 740, 748-749. *Linn's* preemption of non-malicious defamation in libel suits itself establishes that the exception does not swallow the *Garmon* rule; and petitioner advances no argument to show why the relatively new tort of intentional infliction of emotional distress is of a higher dignity. Cf. *Gertz v. Welch*, 418 U.S. 323.

stone for determining whether the states have jurisdiction. Indeed, the foregoing portion of *Linn*, like *Garmon* itself, suggests that an activity constituting an unfair labor practice is for that reason not an activity of "merely peripheral concern of the Labor Management Relations Act."

b. The *Linn* Court did not simply determine that the states could apply their defamation laws to conduct growing out of a labor dispute. Only state suits for malicious defamation, as this Court defined malice, are not preempted. *Linn* holds that in the labor relations context all other defamation actions are beyond the States' jurisdiction:

"We \* \* \* limit the availability of state remedies for libel to those instances in which the complainant can show that the defamatory statements were circulated with malice and caused him damage.

The standard enunciated in *New York Times Co. v. Sullivan*, 376 U.S. 254, are adopted by analogy, rather than under constitutional compulsion. We apply the malice test to effectuate the statutory design with respect to preemption. Construing the Act to permit recovery of damages in a state cause of action only for defamatory statements published with knowledge of their falsity or with reckless disregard of whether they were true or false guards against abuse of libel action, and unwarranted intrusion upon free discussion envisioned by the Act." (383 U.S. at 64-65)

Thus, *Linn* refutes the suggestion that even where the conduct in question is not regulated directly through the prohibitions of § 8 the states are free to apply any general tort law which is not in terms addressed to



labor relations. Here, of course, the conduct in question—the alleged job discrimination and threats thereof—is subject to § 8(b)(2).

*Linn's* recognition that the NLRA preempts state tort laws of general application regulating conduct regulated by the Act as well as state labor relations law does not plow new ground. That preemption issue was met and squarely decided by a unanimous court in *Weber v. Anheuser-Busch*, 348 U.S. 468, 479-480:

“Respondent argues that Missouri is not prohibiting the IAM's conduct for any reason having to do with labor relations but rather because that conduct is in contravention of a state law which deals generally with restraint of trade. It distinguishes *Garner* on the ground that there the State and Congress were both attempting to regulate labor relations as such.

*We do not think this distinction is decisive.* In *Garner* the emphasis was not on two conflicting labor statutes but rather on two similar remedies, one state and one federal, brought to bear on precisely the same conduct. And in *Capital Service, Inc. v. N.L.R.B.* 347 U.S. 501, *supra*, we did not stop to inquire just what category of ‘public policy’ the union's conduct allegedly violated. Our approach was emphasized in *United Constr. Workers v. Laburnum Constr. Corp.* (US) *supra*, where the violent conduct was reached by a remedy having no parallel in, and not in conflict with, any remedy afforded by the federal Act.

Moreover, we must not forget that this case is not clearly one of ‘unfair labor practices.’ Certainly if the conduct is eventually found by the National Labor Relations Board to be *protected*

by the Taft-Hartley Act, the State cannot be heard to say that it is enjoining that conduct for reasons other than those having to do with labor relations. In *Amalgamated Asso. v. Wisconsin Employment Relations Board*, 340 U.S. 383, *supra*, the statute was directed at the preservation of public utility services and not at maintenance of sound labor relations, but the State's injunction was reversed. Controlling and therefore superseding federal power cannot be curtailed by the State even though the ground of intervention be different than that on which federal supremacy has been exercised.” (Emphasis added.)

The law stated in *Weber* was reaffirmed in *Garmon*, 359 U.S. at 244:

“When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law. Nor has it mattered whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations. Regardless of the mode adopted, to allow the States to control which is the subject of national regulation would create potential frustration of national purposes.” (footnote omitted.)

See also *e.g.*, *Borden*, 373 U.S. at 692; *Perko*, 373 U.S. 702-703, and *Liner v. Jafco*, 375 U.S. 301, all preempt-

ing suits on a common law tort theory with contractual relations. As we have stressed, it is the uniform holding of the cases that it is the type of conduct regulated which determines whether state jurisdiction is ousted and not the nature of the state law which seeks to regulate such conduct.

These precedents accord with constitutional principle. As Mr. Justice Frankfurter said in *Weber*: "Controlling and therefore superseding federal power cannot be curtailed by the State even though the ground of intervention be different than that on which federal supremacy has been exercised" (348 U.S. at 480).

And, as Mr. Justice White wrote for the Court in an entirely different context:

"We can no longer adhere to the aberrational doctrine of *Kesler* [v. *Department of Public Safety*, 369 U.S. 153] and *Reitz* [v. *Mealey*, 314 U.S. 33] that state law may frustrate the operation of federal law as long as the state legislature in passing its law had some purpose in mind other than one of frustration. Apart from the fact that it is at odds with the approach taken in nearly all our Supremacy Clause cases, such a doctrine would enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy—other than frustration of the federal objective—that would be tangentially furthered by the proposed state law. In view of the consequences, we certainly would not apply the *Kesler* doctrine in all Supremacy Clause cases. \* \* \* Thus, we conclude that *Kesler* and *Reitz* can have no authoritative effect to the extent they are inconsistent with the controlling principle that any state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Su-

premacy Clause." *Perez v. Campbell*, 402 U.S. 637, 651-652.<sup>19</sup>

The foregoing confirms what is implicit in petitioner's own description of *Linn*,—that the exception therein declared is not applicable here. He states four requirements which must be met if the cause of action under state law is to be allowed. The various elements of that four-part test need not be analyzed, because it is clear, contrary to his contention, that he cannot meet the first part of his own test: that "the conduct in question does not *ipso facto* constitute an unfair labor practice (383 U.S., at p. 63)" (P. Br. 57). In contending that he does meet this test, petitioner says:

"(1) In the first place, *the bulk of the conduct involved here* is not automatically an unfair labor practice. In fact, much of it is obviously not, only a small part of it (if any) is a clear unfair labor practice and the remainder may or may not amount to an unfair labor practice, depending upon the view taken of its primary motivation." (P. Br. 57)

In terms of sheer "bulk" the conduct with which petitioner charged the unions was, it must be reiterated, discrimination in the operation of a hiring hall on the basis of opposition to the union business agent and his

<sup>19</sup> While the Court was divided on the interpretation of the Bankruptcy Act in *Perez* (as it had been in reaching the opposite result in *Kesler* and *Reitz*), the *Perez* minority did not take issue with this interpretation of the Supremacy Clause. Indeed, they agreed that the state statute there challenged was invalid in part (*id.* at 668-671), a result which could not have been reached if the purpose of the state law, rather than its effect in "interfering with the paramount federal interests in [the wife's] bankruptcy discharge" were controlling under the Supremacy Clause (*id.* at 671).



policies; if the jury believed, as petitioner asked it to, that the union engaged in discrimination, this clearly does "*ipso facto* constitute an unfair labor practice." (383 U.S. at 63)

**C. The Duty of Fair Representation and LMRDA Theories Are Not Properly Before This Court.**

Petitioner also invokes the exceptions to *Garmon* for actions based on the breach of a duty of fair representation (under § 301 of the Labor Management Relations Act ("LMRA")) and for improper imposition of union discipline (under §§ 101(a)(5) and 609 of the Labor Management Reporting and Disclosure Act of 1959 ("LMRDA")). Neither of these issues is properly before this Court.

Petitioner says:

"The three causes of action to which Respondents' demurrer was sustained in the trial court were attempts to invoke some of the other exceptions described above. It may be that those causes of action and the various other applicable exceptions are not before this Court in *any direct sense*, but the other exceptions do merit consideration here because they illustrate to what extent Congress and the courts have permitted lawsuits founded upon conduct supposedly within the purview of the Labor-Management Relations Act and the jurisdiction of the Board, and thus what kinds of conduct may be regarded as of only peripheral concern to the scheme of labor relations regulation embodied in the Act." (P. Br. 84, emphasis added.)

If the only purpose of petitioner's discussion were, as this passage suggests, to buttress his argument on the question presented by the Petition, of whether the court below erred in holding that petitioner's tort claim was preempted under *Garmon*, it would be en-

tirely appropriate though not particularly helpful to petitioner's case.<sup>20</sup> But petitioner does not stop there, for he actually invites this Court to consider the duty of fair representation and LMRDA theories on their merits, and to reinstate the jury's verdict on one of those grounds (P. Br. 85-111), although conceding grudgingly that it "may be" that these issues are not before the Court "in any direct sense" (P. Br. 84). Given these inconsistent positions (a tactic which we have observed in other contexts as well, see pp. 25, 38 and 40 *supra*), we find it necessary to point out that these issues are not properly before this Court because 1) this Court's jurisdictional requirements have not been met; and 2) reliance on either of these theories to sustain a verdict after a trial which was limited to plaintiff's claim under state tort law would deny the defendants due process of law.

**1. Jurisdiction**

The single "Question Presented" by the Petition for Certiorari, though argumentatively phrased, squarely

<sup>20</sup> In that respect these theories do not aid petitioner, for both exceptions result from deliberate Congressional judgments to create independent causes of action which may be maintained in the courts rather than before the National Labor Relations Board. They thus do not in the least affect the principle that state claims are ousted where the conduct is governed by §§ 7 and 8 of the National Labor Relations Act, the administration of which is in the exclusive domain of the Labor Board. Indeed, *Boilermakers v. Hardeman*, 401 U.S. 233 expressly acknowledged the *Garmon* principle (*id.* at 240), although, as the concurring opinion notes (*id.* at 247) there was no occasion to either reaffirm or reiterate therefrom. *Hardeman* simply parallels *Gonzales* in that it permits lost wages to be recovered as consequential damages for loss of membership where such loss is independently actionable: "The critical question in this action is whether *Hardeman* was afforded the rights guaranteed him by § 101(a)(5) of the LMRDA", a question "irrelevant to the legality of conduct under the NLRA" (*id.* at 241).



presents the federal question on which the Court of Appeal set aside the trial court's judgment, whether the plaintiff's second cause of action under the state law of torts for intentional infliction of emotional harm, is preempted by the Taft-Hartley Act. It says nothing about the duty of fair representation or union discipline in violation of the Labor Management Reporting and Disclosure Act of 1959. Petitioner's question cannot be read to "fairly comprise[ ]" the two distinct statutory grounds for reversal argued at Pet. 85-111; they are not properly before this Court under Rule 23(1)(c). This is a flagrant instance of the disapproved practice of "smuggling additional questions into a case after we grant certiorari" (*Irvine v. California*, 347 U.S. 128, 129 (opinion of Mr. Justice Jackson)). See also *e.g.*, *Radzanower v. Touche, Ross & Co.*, 44 U.S.L.W. 4762, n. 3 (June 7, 1976); *F. D. Rich Co. v. Industrial Lumber Co.*, 417 U.S. 116, 121, n. 6; *Carpenters Union v. Labor Board*, 357 U.S. 93, 96.

Further, petitioner has not met the requirement of Rule 23(1)(f):

"If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them \* \* \* and the way in which they were passed upon by the court; such pertinent quotations of specific portions of the record, \* \* \* as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari."

In the Statement of the Case there was no mention of the LMRDA at all. The only mention of the duty of fair representation is: "The first cause of action sub-

stantially pleaded a breach of the union's duty of fair representation" (Pet. 9-10). Petitioner noted that demurrers to that and two additional causes of action were sustained (Pet. 10). The only additional reference to these other causes of action was that "judgment was never entered with respect to them (Pet. 10, n. 4, quoted in full at p. 21 *supra*). Petitioner did not even state whether, in his view, the Court of Appeal, in reversing the judgment on Count 2 considered and decided against him the proposition that the verdict should stand because of these alternative statutory theories. If it is his position that the Court did decide that question, then it would have been incumbent on him to show that there was no adequate state ground for its refusal to read these new legal theories back into the verdict. And if it is his position that neither of the state appellate courts decided the duty of fair representation or LMRDA issues, petitioner was required to meet the burden imposed by the rule declared in *Street v. New York*, 394 U.S. 576, and reaffirmed in *Fuller v. Oregon*, 417 U.S. 40, 50:

"[T]his Court has stated that when . . . the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary."

Petitioner of course has made no effort to make such a showing. Indeed, he has entirely ignored the jurisdictional requirements which this Court has imposed for focussing the issues before it, and for assuring itself that, in cases arising out of the state courts those issues have been properly presented below and do not rest on a state ground which would pretermitt review here, *Murdock v. Memphis*, 20 Wall. 590, 632-636.

## 2. The two issues were not before the jury.

In arguing that "the allegations of the single surviving cause of action" (P. Br. 84) may be sufficient to state a claim under the duty of fair representation and LMRDA theories, petitioner says:

"at least as to cases involving breach of the duty of fair representation, this Court had held that in order to do substantial justice, the pleadings must be liberally construed (See *Czosek v. O'Mara*, 397 U.S. 25, 27 (1970) and both federal and California law have long rejected the doctrine of 'theory of the pleadings.' " (P. Br. 84-85, citing cases.)

We of course fully accept the *Czosek* rule, and assume that it applies likewise for pleading a cause of action under the LMRDA; we further assume, that if California had a different rule (which it does not, as petitioner notes), the California courts would be required to follow the federal rule in determining whether federal causes of action are properly pleaded. But, the *Czosek* rule of liberality in the reading of *pleadings* has nothing to do with the case in its present posture. Petitioner is not asking this Court to read the second cause of action to determine if it stated a litigable claim, sufficient to rebuff a motion to dismiss. We are dealing with a full blown cause of action that had been put to trial on the merits, a cause of action whose common-law tort theory had ripened into supporting and opposing evidence and ultimately into submission to a jury with instructions setting forth the elements which the plaintiff was required to prove on that theory. (See IA. 34, quoted pp. 14-15 *supra*.) Petitioner acknowledges that " \* \* \* it is true that the jury was not specifically instructed on the law governing an action for breach of the duty of fair represen-

tation \* \* \* " (P. Br. 95). In completing that thought, however, he says "the instructions actually given imposed on Petitioner a far more onerous burden of proof" asserting that "outrageous conduct which inflicted severe emotional distress" is more than "arbitrary or bad faith conduct" (*id.*).

Petitioner thus assumes, as he must, that union arbitrariness *vis-a-vis* its members *per se* is sufficient to make out a breach of the duty of fair representation. For the jury had no guiding instructions with respect to any elements of this federal violation. For example, the jury was not instructed that it had to find that the union caused a violation of the collective bargaining agreement in order to establish liability. (Cf. *Hines v. Anchor Motor Freight*, — U.S. —, 44 U.S.L.W. 4299). Moreover, petitioner introduced evidence of conduct other than discrimination in the operation of the hiring hall (see A-21, and P. Br. 50). While we do not agree with petitioner (*id.*) that this other conduct played a substantial role in the liability determination, the verdict makes this uncertain, and it is more probable than not that the evidence had its intended effect of increasing the general and punitive damages which the jury awarded.

But the duty of fair *representation*, as the very phrase demonstrates, does not encompass every arbitrary action by a union. As Chief Justice Stone said in creating and defining the duty "So long as a labor union assumes to act as the statutory representative of a craft, it cannot rightly refuse to perform the duty, which is inseparable from the power of representation conferred upon it, to represent the entire membership of the craft" (*Steele v. Louisville & N.R.*



*Co.*, 323 U.S. 192, 204). Here the case that went to the jury and which produced the general verdict was not limited to acts of the union as "the statutory representative."<sup>21</sup> In short, even if, as petitioner says, "the first cause of action *substantially* pleaded a breach of the union's duty of fair representation" (P. Br. 11, emphasis added), the defendants would not have been on notice that the duty of fair representation claim was involved in the trial. Actually, the word "substantially", is an important qualification, because plaintiff said nothing about the duty of fair representation in resisting the demurrer or at any time in the trial court; that theory first came into the case in the Court of Appeal. Thus, while under *Czosek* a Court, in ruling on a motion to dismiss (or on appeal from the granting of such a motion) might arguably treat the first cause

<sup>21</sup> *Richardson v. Communication Workers*, 443 F.2d 974 (C.A. 8) which arose on extreme facts, see *id.* at 983, n. 12, is to that extent completely inconsistent with the underlying theory of the duty.

We also submit that a discriminatory refusal to refer out of a union hiring hall is not a breach of the duty of fair representation, although it will frequently be a breach of a collective bargaining agreement. When a union operates a hiring hall its authority to do so derives not from its status as exclusive bargaining representative, but from the collective agreement itself. In that situation the union is responsible for the hiring decision, and the employer is not implicated at all. *Cf. Hines, supra. Smith v. Sheet Metal Workers*, 500 F.2d 741 (C.A.5) cited for the contrary proposition, at P. Br. 88, adopted a fundamentally incorrect approach to the duty of fair representation. It stated that the jurisdictional basis for a duty of fair representation suit is not § 301, ~~rev.~~ 28 U.S.C. § 1337; see *id.* at 746-747, a view squarely contrary to *Humphrey v. Moore*, 375 U.S. 335 and its progeny. The present point was not discussed and apparently not argued. Plainly the *Smith* opinion, aside from its more basic infirmity, "lacks the precedential weight of a case involving a truly adversary controversy" (*Bob Jones University v. Simon*, 416 U.S. 725, 740).

of action as sufficiently raising a duty of fair representation claim—if anyone called that interpretation to its attention—defendants had no notice of this whatsoever.<sup>22</sup>

Moreover, on petitioner's theory of the ground on which jury verdicts can be sustained, the pleadings are actually irrelevant. For petitioner urges this Court to affirm on the LMRDA ground, even though he nowhere asserts that that theory was raised by his pleadings "substantially" or otherwise. And of course, the jury was given no instructions with respect to the elements of an LMRDA violation either.

Furthermore, pleadings do have a purpose—to give notice to the adversary concerning what the issues will be at trial. Here, since the case went to trial only on the second cause of action the defendants had no notice that they would be called upon to defend a duty of fair representation claim or a claim for improper discipline in violation of the LMRDA. In fact, plaintiff painstakingly excluded from the single count that went to trial the allegations of the complaint (par. 6 and 7) which set forth certain provisions of the collective bargaining agreement and the hiring hall rules.

Petitioner is equally casual about defenses that respondents could have raised if they had had notice that anything but a tort claim would be tried with respect to the exhaustion of internal union remedies. Peti-

<sup>22</sup> Moreover, it is one thing to read a federal pleading generously to sustain a federal cause of action or a state court pleading to raise a state cause of action. But to read a federal cause of action into a state court pleading long after the event deprives the defendant of his statutory right to remove the federal cause of action.



tioner asserts that the facts show that defense would be without merit. For this he cites the answers to the interrogatory which do not substantiate his position, which, though reproduced in the appendix do not appear ever to have been introduced in evidence,<sup>23</sup> and above all with respect to which the jury (which after all is the fact finder) was given no instructions. There are doubtless many other ways in which defendants' trial judgments, including the introduction and objection to evidence, and request for instructions, would have differed if the duty of fair representation and LMRDA had been in issue. And, it is not unlikely that the plaintiff, too, would have tried the case differently, for example, by requesting instructions on the elements of violation under those theories.

The tacit assumption of petitioner's argument is that one party can be heard to argue after the event what the nature of its adversary's defense would have been if it had been on notice that a particular theory of a claim was being litigated, and further to infer what verdict the jury would have reached (not only as to liability but as to the precise amount of damages) if the case had been tried on the alternative theory and the jury had been properly instructed. This Kafkaesque approach to litigation is an affront to the most rudimentary requirements of "due process of law—using that term in its primary sense of an opportunity to be heard and to defend [the party's] substantive right" (*Brinkerhoff-Faris Trust & Sav. Co. v.*

<sup>23</sup> The reference "CT 478, 483" (P. Br. 89) refers to the Clerk's transcript consisting of the formal documents. Petitioner does not assert that this particular interrogatory, and the answers thereto, were ever read into the record, and it is the recollection of trial counsel that they were not.

*Hill*, 281 U.S. 673, 678, Brandeis, J.). Cf. *Hardeman*, 401 U.S. at 245, discussing notice under § 101(a)(5)—the LMRDA's "due process" provision.<sup>24</sup>

## II. PETITIONER'S RELIANCE ON THE ACT OF DISCRIMINATION FOUND BY THE LABOR BOARD AND ON THE BOARD'S DETERMINATION INDEPENDENTLY SUPPORTS THE COURT OF APPEAL'S JUDGMENT.

Petitioner argues that this Court should abandon the preemption test stated in *Garmon* and should instead adopt the standard articulated in *Teamsters Union v. Morton*, 377 U.S. 252 (P. Br. 120-125). We submit that *Garmon* should remain the law, because it is soundly reasoned, given the judgments which Congress made in enacting the NLRA, and given the general principle of *stare decisis*, which in this instance is reinforced by the legislative ratification effected when Congress in 1959, fully conscious of the *Garmon* principle, preserved the exclusive federal role with

<sup>24</sup> Compare, also, *Silver v. New York Stock Exchange*, 373 U.S. 365, n. 18:

"The principle that a private association's failure to afford procedural safeguards may result in the imposition of damage liability without inquiry into whether the association's action lacked substantive basis is reflected in many state-court decisions, resting on various theories of liability.

• • •

The precedents cited undoubtedly rest on a recognition that the according of fair procedures is of fundamental significance, that serious and irreversible economic injury may result from their denial in a context like that of the present case, and that a substantive inquiry after the fact cannot possibly succeed in accurately ascertaining retrospectively what the outcome would have been had the procedural safeguards been afforded in the first instance." (emphasis added.)

respect to conduct regulated by the Act and over which the Board has retained jurisdiction.<sup>25</sup>

In any event, we submit the analysis which petitioner embraces, and which originates with Professor Cox<sup>26</sup> is inconsistent not only with *Garmon* but also with *Morton*. For *Morton* and *Garmon* do not state antithetical doctrines. Both apply the same statute and

<sup>25</sup> See Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 Harv. L. Rev. 1086, 1094-1095:

"Considered in the context of the LMRDA, the new formula for allocating jurisdiction over labor-management disputes between the federal government and the states is something of a paradox. Ostensibly, it nullifies the decisions of the Supreme Court in the *Guss* and companion cases and restores a measure of power to state courts and agencies. Its net effect, however, is to adopt the long line of Supreme Court decisions confirming the federal government's preemption of the labor-relations field; while throwing a few crumbs to the states, Congress made it clear that the lion's share of labor cases is reserved exclusively for the NLRB and the federal courts. The expansion of federal power is even more dramatically illustrated, of course, by the other titles of the LMRDA creating federal standards for the conduct of internal union affairs—an area previously within the exclusive control of the states." (footnote omitted.)

The legislative ratification of *Garmon* is fully discussed in the brief *amicus curiae* of the AFL-CIO in this case which we adopt and shall not duplicate.

<sup>26</sup> Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337 (1972).

Contrary to petitioner, however, even under Prof. Cox's view petitioner would not be entitled to prevail, for Prof. Cox agrees that the results in *Borden* and *Perko* were correct, 85 Harv. L. Rev. 1376, n. 174. Since this case is on all fours with *Borden*, see pp. 36-37 *supra*, approval of *Borden* requires affirmance of *Hill*.

the same Supremacy Clause. Both are concerned with conflict between the NLRA and state law.<sup>27</sup>

*Garmon* was "concerned with conflict in its broadest sense; conflict with a complex and interrelated federal scheme of law, remedy, and administration" (359 U.S. at 243). *Morton* dealt with conflict only in the first two of these three categories. The conflict concerning "administration"—that is, the exclusivity of the primary jurisdiction of the National Labor Relations Board—was not involved in *Morton* because the conduct complained of included the secondary boycott. For Congress, having regarded the secondary boycott (and other violations of § 8(b)(4)) to be particularly serious unfair labor practices, provided an additional remedy for persons injured thereby—§ 303(a) restated § 8(b)(4)'s prohibitions, and § 303(b) provided a federal court action for actual damages proximately caused by the violation of § 303(a). And *Morton* was a suit under § 303(b) to which the plaintiff attached a pendent claim under the common law of Ohio. He recovered a judgment for damages caused by the violation of federal law, and further compensatory damages for two violations of state law. Addi-

<sup>27</sup> To the extent that the Cox analysis is based on the nature of the law which the state is seeking to enforce, it is unsound for the reasons developed at pp. 55-59 *supra*. We note particularly that Prof. Cox's analysis of *Linn*, *id.* at 1367-1368, fails to take account of the fact that the state tort law of non-malicious defamation was preempted, see pp. 55-56 *supra*. We recognize that Mr. Justice Powell and the Chief Justice referred with approval to that part of the analysis in *Machinists v. Wisc. Emp. Rel. Bd.*, — U.S. —, 44 U.S.L.W. 5026, 5033. But the point was not argued in that case, and the objections to that view in principle and precedent were not therefore fully developed. Cf. *Bob Jones University v. Simon*, 416 U.S. at 740, quoted at p. 66, n. 21 *supra*.



tionally, he was awarded punitive damages. The Court determined that because the Ohio common law prohibited conduct which federal law did not prohibit, and thereby left to the free play of economic forces, a damage award under the Ohio law conflicted with federal policy and could not stand. This clearly was an example of what *Garmon* described as a conflict with the "federal scheme of law" (*id.*, our emphasis). *Morton* also exemplifies conflict with the federal scheme of "remedy". For, the *Morton* court also reversed the punitive damage award:

"Punitive damages for violations of § 303 conflict with the congressional judgment, reflected both in the language of the federal statute and in its legislative history, that recovery for an employer's business losses caused by a union's peaceful secondary activities proscribed by § 303 should be limited to actual, compensatory damages. And insofar as punitive damages in this case were based on secondary activities which violated *only* state law, they cannot stand, because as we have held, substantive state law in this area must yield to federal limitations. In short, this is an area 'of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law.' *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173, 176. Accordingly, we hold that since state law has been displaced by § 303 in private damage actions based on peaceful union secondary activities, the District Court in this case was without authority to award punitive damages." (377 U.S. at 260-261, footnote omitted, emphasis added.)

For present purposes, the essential point of the foregoing is that because Congress had determined to permit only actual compensatory damages for illegal secondary boycotts, punitive damages could not be recovered for the same conduct under the state law which also prohibited such boycotts. In other words, insofar as state law exceeded the substantive prohibitions of federal law, the state law was preempted by the substantive limitations on § 303 liability, and to the extent that there was an overlap between state law and § 303, insofar as the state remedy exceeded the federal remedy, the state remedy was preempted by the remedial limitations on § 303 recoveries.<sup>28</sup>

The lesson for the present case is clear. As plaintiff chose to litigate this case, the jury was invited to determine liability and/or assess damages on the basis of the precise unfair labor practice which the National Labor Relations Board had already remedied by a back pay award in excess of \$2500 (together with the usual cease and desist and notice posting requirements). The jury was instructed that it could award damages supplementing that back pay award for that conduct although, as the instruction clearly stated, the Board was without authority to award damages for medical expenses, pain and suffering or punitive damages. It is such supplementation of federal remedies, for unfair labor practices by state remedies, including punitive damages, for exactly the same conduct, which *Morton* held to be impermissible conflict. On this proposition *Garmon* and *Morton* are as one. The policy, embodied

<sup>28</sup> The Court's disposition of a further issue in the case (*id.* at 261-262) can be analyzed in terms of either a substantive or remedial conflict.



in § 10(c), that there should be no punitive damages for violations of § 8, is older than and equally strong as, the identical policy embodied in § 303.

The fullest statement of that policy is that of Chief Justice Hughes in *Republic Steel Corp. v. Labor Board*, 311 U.S. 7, 10-12:

"We think that the theory advanced by the Board proceeds upon a misconception of the National Labor Relations Act. The Act is essentially remedial. It does not carry a penal program declaring the described unfair labor practices to be crimes. The Act does not prescribe penalties or fines in vindication of public rights to provide indemnity against community losses as distinguished from the protection and compensation of employees. Had Congress been intent upon such a program, we cannot doubt that Congress would have expressed its intent and would itself have defined its retributive scheme.

"The remedial purposes of the Act are quite clear. It is aimed, as the Act say (§ 1) at encouraging the practice and procedure of collective bargaining and at protecting the exercise by workers of full freedom of association, of self organization and of negotiating the terms and conditions of their employment or other mutual aid or protection through their freely chosen representatives.

\* \* \*

"\* \* \* We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act. We have said that 'this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board of inflict upon the employer any penalty it may choose because he is en-

gaged in unfair labor practices even though the Board be of the opinion that the policies of the Act might be effectuated by such an order.' We have said that the power to command affirmative action is remedial, not punitive. *Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197, 325, 236. See, also, *National Labor Relations Board v. Pennsylvania Greyhound Lines*, 303 U.S. 261, 267, 268. We adhere to that construction.

"In that view, it is not enough to justify the Board's requirements to say that they would have the effect of deterring persons from violating the Act. That argument proves too much, for if such a deterrent effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to that end."

See also, *Local 60, United Brotherhood of Carpenters v. Labor Board*, 365 U.S. 651, 655; *Local 57, International Ladies' Garment Wkrs.' U. v. N.L.R.B.*, 374 F.2d 295, 303-304 (D.C. Cir., Burger, J.).

To allow punitive damages under state law for conduct regulated by § 8(b)(2) when such damages may not be recovered under state law for conduct regulated by § 8(b)(4) (and § 303) would be wholly inconsistent, not only with the foregoing, but with the scheme of values which led Congress to allow a judicial remedy only for the latter unfair labor practices. In sum, as Chief Judge Parker said in *United Mine Workers v. Patton*, 211 F.2d 742 (C.A. 4), cert. denied 348 U.S. 824:

"Where Congress has intended that damages in excess of the actual damage sustained by plaintiff may be recovered in an action created by statute,

it has found no difficulty in using language appropriate to that end \* \* \*.

\* \* \* \*

"In the absence of anything in the act itself or in its history indicating an intention on the part of Congress to authorize the recovery of punitive damages by this highly controversial legislation, the courts would not be justified, we think, in construing it to permit such recovery. In *Amazon Cotton Mill Co. v. Textile Workers Union of America*, 4 Cir., 167 F.2d 183, 186, which dealt with the same statute, we quoted with approval the language of the Supreme Court in a case involving the Railway Labor Act, 45 U.S.C.A. § 151 et seq., to the effect that, 'The inference is strong that Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate'. We are still of that opinion. In the light of the history of recent labor legislation, it is hardly conceivable that Congress could have intended to vest in the courts the power to punish unions by awards of punitive damages. Certainly, in the struggle over this act, which was vetoed by the President and passed by the Congress over his veto, no one ever suggested, so far as we are advised, that punitive damages could be awarded under its provisions." (211 F.2d at 749-750).<sup>29</sup>

<sup>29</sup> While the issue is not before the Court, see point IC, *supra*, we think it may not be inappropriate, given petitioner's elaborate discussion of the matter, to observe that the Congressional policy against punitive damages implemented in the cases discussed in the text precludes the imposition of such awards in suits for breach of the duty of fair representation and under the LMRDA as well, for both are also expressions of the national labor policy. Petitioner's argument for punitive damages because of their deterrent effect is squarely refuted by *Republic Steel*. See also *Garment Workers*, p. 75, *supra*, "Deterrence alone is not a proper

The state court's award of punitive damages (and by a parity of reasoning, for compensatory damages of a kind not authorized by the NLRA) conflicts with the federal scheme of remedies and thus may not stand whether *Garmon* or *Morton* governs.

### CONCLUSION

For the reasons stated at pp. 21-27, the judgment below is not final and the writ of certiorari should be dismissed for want of jurisdiction. If the merits are reached, the judgment of the Court of Appeal should be affirmed.

Respectfully submitted,

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basis for a remedy" (374 F.2d at 303). So too Congress has abjured retribution.

Petitioner adds a third justification for an award of punitive damages—as compensation for lost wages not sought: "• • • Due to the uncertain state of the law as a result of decisions like *Borden*, *Perko* and *Lockridge*, Petitioner refrained from seeking lost wages, and the jury was instructed that no lost wages could be awarded. (CT 102-114, 530; App. 1-16, 41.)" (P. Br. 109). Suffice it to say here that such an argument departs again from basic notions of due process. But its statement emphasizes the unrestricted nature of the punitive damages concept and the inconsistency of that concept with the careful balances struck by our national labor policy. More than that, petitioner's argument in the context of this case assumes that the jury disregarded an instruction given at plaintiff's behest.

# APPENDIX



## APPENDIX

## Statutes and Rules Involved

Sections 7, 8(a)(1), 8(a)(3), 8(b)(1)(A), 8(b)(2) and 10(a), (b) and (c) of the National Labor Relations Act of 1935 as amended, 49 Stat. 449, *et seq.*, 61 Stat. 136, *et seq.*, 73 Stat. 519, *et seq.* provide in pertinent part as follows:

§ 7. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

§ 8. Unfair labor practices

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

\* \* \* \* \*

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization \* \* \*

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7. *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; \* \* \*

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

#### §10. Powers of Board generally

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where dominantly local in character) even though such cases may involve State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

Complaint and notice of hearing; answer; court rules of evidence applicable

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless

the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further*, That in determining whether a complaint shall issue alleging a violation of subsection (a)(1) or (a)(2) of section 8, and in deciding such cases, the same regula-

tions and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

28 U.S.C. § 1257(3) provides:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows: . . .

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

Rule 23(1) of the Supreme Court of the United States provides in pertinent part:

. . .  
(c) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. Only the questions set forth in the petition or fairly comprised therein will be considered by the court.

. . .  
(f) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the court of first instance and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e. g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e. g., ruling on exception, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari.

Where the portions of the record relied upon under this subparagraph are voluminous, then they shall be included in an appendix to the petition, which may, if more convenient, be separately presented.



FOR ARGUMENT

IN THE  
SUPREME COURT  
OF THE UNITED STATES

Supreme Court, U. S.  
FILED

NOV 3 1976

WILLIAM H. RODAK, JR., CLERK

October Term, 1975  
No. 75 - 804

JOY A. FARMER, Special  
Administrator of the Estate  
of Richard T. Hill,

Plaintiff-Petitioner,

vs.

UNITED BROTHERHOOD OF  
CARPENTERS AND JOINERS  
OF AMERICA, LOCAL 25,  
et al.,

Defendants-Respondents.

---

ON WRIT OF CERTIORARI TO THE  
CALIFORNIA COURT OF APPEAL  
SECOND APPELLATE DISTRICT,  
DIVISION FIVE

---

PETITIONER'S REPLY BRIEF

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IN THE  
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October Term, 1975  
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JOY A. FARMER, Special  
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Defendants-Respondents.

---

PETITIONER'S REPLY BRIEF

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INTRODUCTION

---

In his opening brief, Petitioner sought  
to establish that the protracted campaign of  
vilification, harrassment and referral discrim-  
ination carried on against him by Respondents

1.

so little touched the matters with which Congress was principally concerned when it enacted the Labor-Management Relations Act that to permit a lawsuit founded on that misconduct could scarcely frustrate the National Labor Relations Board's effectuation of any of Congress' central purposes. To that end, Petitioner examined in detail the legislative history of the Labor-Management Relations Act and the Labor-Management Reporting and Disclosure Act, and exhaustively explored the policies underlying the rule of federal labor law preemption announced in San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959) and the several exceptions thereto. Petitioner argued in addition that if his claim came within none of the mentioned exceptions, considerations both of fundamental fairness and of public policy required re-examination of the Garmon doctrine, at least as it is applied in the area of union-member disputes.

The brief which Respondents have filed in reply relies largely on the technical complexities of existing preemption law, and avoids the policy considerations and issues of legislative intent which Petitioner had thought paramount. If that were all, it would require only a perfunctory response. Unfortunately, it also seriously misconceives a number of issues, the law and much of Petitioner's argument, necessitating a somewhat more elaborate answer.

The AFL-CIO and the National Labor Relations Board have both filed amicus curiae

briefs in support of Respondents' position. The arguments advanced in those briefs largely parallel Respondents' contentions, and will be dealt with in the course of Petitioner's reply thereto.

## II

### ARGUMENT

---

A. RESPONDENTS' ASSERTION  
THAT THE JUDGMENT IS  
NOT FINAL IS FOUNDED ON  
A MISUNDERSTANDING OF  
PETITIONER'S POSITION  
AND OF THE APPLICABLE  
LAW.

---

Respondents argue preliminarily that because Petitioner has indicated that a continuing dispute exists as to the status of three causes of action to which Respondents successfully demurred in the trial court, the judgment here under review is not final (Resp. Br., pp. 21-27). This contention misconceives Petitioner's position and is in any event legally meritless.



1. The judgment herein was entered upon a verdict on one of four causes of action stated in Petitioner's First Amended Complaint [CT 570-571; App. 67-69]. The judgment did not in any way purport to dispose of the three causes of action to which Respondents' demurrer had been sustained. The effect of this omission was, at least theoretically, to render the judgment nonappealable, since California's courts, unlike the federal courts, adhere without exception to the "one final judgment" rule, under which judgments on individual causes of action against the same defendants in the same lawsuit may not be separately appealed. (Cf. U. S. Financial v. Sullivan, 38 Cal.App.3d 5, 11, 112 Cal.Rptr. 18 (1974) and cases there cited with Cold Metal Process Co. v. U.S. Eng. etc. Co., 351 U.S. 445 (1956); Sears, Roebuck & Co. v. Mackey, 351 U.S. 427 (1956); Reeves v. Beardall, 316 U.S. 283 (1942); Rule 54(b), Fed. Rules of Civ. Proc.) An appeal from a judgment involving fewer than all causes of action between the same parties is regarded under California law as jurisdictionally defective and it follows that such a defect may be raised at any stage of the appellate process. (Greenfield v. Mather, 14 Cal.2d 228, 93 P.2d 100 (1939); Mather v. Mather, 5 Cal.2d 617, 55 P.2d 1174 (1936).)

Neither side herein noticed the mentioned defect in the judgment and the appeal was briefed and argued in the Court of Appeal as if the defect did not exist. The Court of Appeal itself missed the defect and was evidently of the belief that the

judgment covered all causes of action. (See Petition for Writ of Certiorari, p. A-2, fn. 2.) It was not until Petitioner undertook to obtain a hearing in the California Supreme Court that the defect was discovered.

As is revealed in the passage quoted by Respondents from the Petitioner's Petition for Hearing (see Resp. Br., pp. 22-23), Petitioner was initially of the view that the defect was so fundamental that the decision of the Court of Appeal was an utter nullity and that even if hearing were denied, the Court of Appeal's decision would still be subject to collateral attack.

Following denial of his Petition for Hearing, however, sober reflection on the effect of denial of hearing<sup>1/</sup> led Petitioner to conclude that both as a practical matter and as a

---

<sup>1/</sup> Denial of hearing by the California Supreme Court is unlike denial of certiorari by this Court. Denial of hearing indicates not just that there were insufficient votes for hearing but that the California Supreme Court approves the result, if not necessarily the reasoning, embodied in the decision of the Court of Appeal. (DiGenova v. State Board of Education, 57 Cal.2d 167, 18 Cal.Rptr. 369, 367 P.2d 865 (1962); Eisenberg v. Superior Court, 193 Cal. 575, 226 P. 617 (1924); Gustafson, Some Observation on California's Courts of Appeal, 19 UCLA L.Rev. 167, 170-177 (1971).)

matter of law the cause of action which had been reduced to judgment had been finally determined and was beyond challenge so far as California's courts were concerned, despite the "one final judgment" rule. On that basis, Petitioner sought certiorari from this Court. Obviously, if Petitioner had continued to believe as he did at the time of the Petition for Hearing, he would not have deemed it necessary or appropriate to come to this Court for such relief. Having thus in good faith invoked this Court's jurisdiction, Petitioner has no intention whatsoever of attempting a collateral attack upon the judgment here under review should this Court affirm it, Respondents' dire warnings (Resp. Br., pp. 23, 27) notwithstanding.

2. But the conclusion that the judgment is final as to the one cause of action now before this Court does not dispose of the remaining causes of action. Quite the contrary, a necessary implication of the California Supreme Court's denial of hearing is that, despite Petitioner's prior belief, the judgment entered on the one cause of action permitted to go to trial was in fact separately appealable; and from this it necessarily follows that the sustaining of the demurrer to the remaining causes of action, if and when a judgment of dismissal is entered upon that ruling, will also be separately appealable, despite the "one final judgment" rule. Obviously, nothing about this conclusion is in any way inconsistent with Petitioner's position that the judgment now before this Court is final. In fact, the situation is essentially the same as when a Federal District Court certifies a

severable claim for separate appeal under Rule 54(b) of the Federal Rules of Civil Procedure. The judgment upon the claim so certified is final for purposes of appeal even though the remaining claims are still to be disposed of.

3. Respondents cite and principally rely upon two cases, Cox Broadcasting Corp. v. Cohn, 420 U.S. 419 (1975) and Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62 (1948) in support of their contention that the judgment lacks finality. Those decisions, however, and the several earlier decisions which they discuss are concerned with a very different kind of situation from that presented here. In those cases, interlocutory rulings were sought to be brought before this Court prior to determination of all issues necessary to a final judgment disposing of a single and basically indivisible claim for relief. The danger feared in each of those cases was that the proceedings yet to be completed would render moot this Court's decision on the interlocutory ruling, or that the remaining proceedings would engender further federal questions requiring a second review by this Court. Here, what is involved is not an interlocutory ruling in a single unseverable controversy not as yet reduced to judgment, but a final decision on one of several distinct (and, as the California Supreme Court's denial of hearing indicates, severable and severally appealable) claims for relief. Any further proceedings respecting the causes of action not included in the present judgment would involve only those causes of action. Those proceedings, if any, would remain utterly separate and apart from such further



proceedings as this Court's decision herein might necessitate in the Court of Appeal. There is not the slightest chance that anything that might be decided with regard to the remaining causes of action would render moot the decision reached herein. And to the extent that the remaining causes of action present the possibility of further federal questions requiring further decisions by this Court, they are no different from the claims remaining for subsequent adjudication when a judgment is entered on fewer than all of the claims in a lawsuit and an immediate appeal is taken therefrom under Rule 54(b).

4. It might be added that Petitioner is not so set upon pursuing the remaining causes of action that he would suffer dismissal of the writ of certiorari in order to enjoy that privilege. Thus, if despite the foregoing considerations, this Court has any doubt that the continuing dispute over the remaining causes of action affects the finality of the judgment here for review, Petitioner will stipulate to any adverse disposition of those causes of action which this Court may require.

B. THE KIND OF MISCONDUCT INVOLVED HERE IS IN FACT ONLY DISTANTLY RELATED TO THE MAIN CONCERNS OF THE LABOR MANAGEMENT RELATIONS ACT. IN MAINTAINING OTHERWISE, RESPONDENTS HAVE MISCONSTRUED BOTH PETITIONER'S ARGUMENTS AND THE APPLICABLE LAW.

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In his Opening Brief, Petitioner discussed at length the several ways in which a case arising under state law of general application, as this one did, may come within the literal terms of the Garmon principle. He demonstrated that unlike cases involving actually or arguably protected conduct, this case -- to which the Garmon principle applies, if at all, only to the extent that the case involves clear violations of the Labor-Management Relations Act or to the extent that the Board only arguably has the authority to prohibit the conduct in question -- presents few of the risks of conflict that the Garmon formula was designed to avoid (Pet Op. Br., pp. 39-48).

Petitioner was also at pains to show that while the Board and the Courts may have concluded that a portion of the conduct herein is within Board jurisdiction, most of that conduct -- discrimination in hiring hall referrals directed



at one already a union member, occurring in an already securely organized industry, and involving motivations which went far beyond "encouragement" or "discouragement" of union "membership" under even the most expansive construction which might be given Section 8(b)(2) -- was not among the varieties of conduct which Congress in enacting the Labor-Management Relations Act had particularly intended to single out for Board regulation (Pet. Op. Br., pp. 22-33, 48-51).

On the foregoing grounds, Petitioner urged that this case ought to be deemed within the recognized exception to the Garmon principle for matters peripheral to the scheme of labor relations regulation embodied in the Labor-Management Relations Act (Pet. Op. Br., pp. 54-72).

Respondents have made no reasoned reply to Petitioner's discussion of the legislative history of the Labor-Management Relations Act and of the policies sought to be served by the Garmon formula. They bottom their case primarily on the authority of Plumbers Union v. Borden, 373 U.S. 690 (1963), assuming, without ever troubling to show why, that a mindlessly literal and wooden application of the Garmon rule to cases like this one is somehow necessary to the Board's effective implementation of federal labor policy, no matter how remote the conduct in question may be from the main purposes of the Labor-Management Relations Act. And they urge, again without suggesting any good reasons for their view, that the recognized exception for matters of only peripheral concern to the federal scheme of labor

relations regulation should be narrowly construed and applied, even to the point of rendering the exception meaningless (Resp. Br., pp. 33-60).

A number of the points raised by the Respondents in support of their position require comment.

1. While not disputing Petitioner's analysis of the policies sought to be served by the Garmon formula, Respondents purport to dispute Petitioner's position that none of the misconduct of which the jury found Respondents guilty was federally protected (Resp. Br., pp. 37-38). The Board joins them in this contention (NLRB Br., pp. 28-33).

On closer examination, however, Respondents' and the Board's quarrel with Petitioner is not that they believe there is any possible ground on which the misconduct in which the jury found Respondents had engaged could be deemed protected. Indeed, since the jury could hardly have found Respondents' conduct outrageous if it accepted Respondents' claim that they either had not discriminated against Petitioner at all or, if they had, they were justified in doing so by Petitioner's own behavior, the verdict necessarily negatives the facts on which it is urged that the Board might have determined Respondents' conduct to be protected. Instead, it is the apparent position of Respondents and the Board that had Respondents' very different version of the facts been accepted, there then would have existed a basis on which Respondents' conduct might have been

deemed protected.

But this is simply another way of saying that the Board might have resolved the disputed issues of fact differently than did the jury. There is of course no indication that the Board would in fact have done so, and its determination regarding the one portion of the continuing course of misconduct which was submitted to it suggests that it would not.<sup>2/</sup> More to the point, the bare possibility that the Board might make different findings of fact than the jury represents a far less serious threat to the federal scheme of labor relations regulation than state prohibition of federally protected conduct, such as Respondents and the Board suggest, but fail to establish, was involved here. The instant case is thus quite different from Borden in this respect, not identical to it as Respondents indicate (Resp. Br., pp. 37-38). While Borden does advert to contested issues of fact, the crucial issue there was one of policy, not fact: whether the union's procural of what amounted to a discharge in an attempt to enforce a union rule forbidding members from directly soliciting their own jobs should be regarded as protected or prohibited.

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<sup>2/</sup> Professor Archibald Cox regards the possibility of different findings of fact "inconsequential" in this context. (Cox, Labor Law Preemption Revisited, 85 Harv. L. Rev. 1337, 1374 (1972).)

It might be added that to the extent that Respondents and the Board suggest that a difference in result was rendered somehow more probable because the problems inherent in the operation of hiring halls are complex and because the jury lacked the Board's expertise as to such matters (see Resp. Br., pp. 37-38; NLRB Br. pp. 33-34) they mistake the nature of the function performed by the jury and they misconceive the source of the complexity which characterized the trial herein. While the trial was certainly lengthy and the evidence voluminous, that fact reflected not any particular complexity in the rules governing operation of the hiring hall but rather the fact that Petitioner was forced to wring much of his evidence from hostile witnesses and to subject those witnesses to extensive cross examination in order to reconcile the numerous inconsistencies in their account of Respondents' hiring hall rules and the manner in which those rules were applied to Petitioner. Sitting through Petitioner's attempts to elicit what turned out to be rather simple facts required of the jury more than a little patience, but understanding the evidence and determining who was lying and who was telling the truth hardly required of it any of the special expertise which the Board says it could have brought to the problem. Furthermore, since the jury tested Respondents' conduct against state tort law and not federal labor relations law, its lack of familiarity with federal labor policy can hardly have hampered its deliberations.



2. According to Respondents, this case comes within Plumbers Union v. Borden, supra, because (a) most of the conduct in issue involved hiring hall discrimination, (b) that conduct had as its purpose the "encouragement" or "discouragement" of union "membership" as Congress intended those terms to be construed, and (c) in any event Petitioner actually demonstrated the conduct herein to be subject to Board regulation by filing a successful unfair labor practice charge based on one act of direct job interference (Resp. Br., pp. 36-37).

No portion of this argument can withstand close scrutiny.

a. To begin with, what Respondents characterize as "hiring hall discrimination" in Borden involved more than mere refusal of a job referral. Since the employee there had actually been promised a job by an employer, the discrimination took the form of direct interference with an existing employment relation. This kind of job interference -- tantamount to a union procured discharge -- closely resembled the job interference that the proponents of Section 8(b)(2) had expressly and specifically indicated they wished to prohibit, even if only as a matter incidental to the section's main purpose. (See Pet. Op. Br., pp. 28-29; see also NLRB Br., pp. 19-20.) Here, on the other hand, the hiring hall discrimination consisted, with one exception, of simple refusal of job referrals and not an interference with any such existing employment relation.

As Petitioner attempted to show in his opening brief, this is more than a distinction without a difference. For while it is abundantly clear from the legislative history of Section 8(b)(2) that Congress intended thereby to prevent unions from urging or forcing closed shop agreements upon employers and also from causing employers with whom they might enter into maintenance of membership agreements to fire expelled union members, it is by no means apparent that Congress intended to commit to Board regulation the actual operation of hiring halls and it is even less clear that it meant the Board to monitor referral discrimination aimed at a member and occurring not in the course of an organizing effort but long after the union had become firmly entrenched as exclusive bargaining representative (Pet. Op. Br., pp. 25-29). A similar conclusion flows from the language of Section 8(b)(2) itself. Section 8(b)(2) literally proscribes not union discrimination as such but union efforts to cause an employer to discriminate.<sup>3/</sup> Moreover, the section specifically proscribes union instigated employer discrimination

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This Court expressly so recognized in International Association of Machinists v. Gonzales, 356 U.S. 617, 622 (1958), when it said that the suit therein

"did not purport to remedy or regulate union conduct on the ground that it was designed to bring about employer discrimination against an employee, the evil which the Board is concerned to

(con't p. 16)



following termination of membership, the precise evil to which the section's proponents adverted in debate. On the other hand, it is only by a somewhat strained interpretation of the section's language that it can be applied at all to such unilateral union conduct as discrimination in hiring hall referrals, since the employer is involved therein only to the extent that he has allowed the union to act as his agent for the purpose of selecting new employees.

It may well be that the foregoing view is contrary to the conventional wisdom on the subject, but it is significant that neither Respondents nor amici curiae, despite their claim that Congress intended to subject hiring halls to minute regulation (Resp. Br., pp. 44-49; NLRB Br., pp. 19-23, 33; AFL-CIO Br., pp. 31-41), have been able to point to any portion of the legislative history which provides any solid substantiation of the conventional wisdom. Indeed, the portions of the legislative history cited by the Board only confirm Petitioner's view.

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3/ (con't from p. 15)

strike at as an unfair labor practice under Section 8(b)(2). "

The Gonzales Court further described Board proceedings conducted under Section 8(b)(2) as "looking principally to the nexus between union action and employer discrimination. . . ." (Id., at p. 623.)

In lieu of legislative history, Respondents rely on this Court's decisions in Radio Officers v. NLRB, 347 U.S. 17 (1954), Local 357, International Brotherhood of Teamsters v. NLRB, 365 U.S. 195 (1961) and Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941) and characterize Petitioner's position as an "ill disguised attack" on Radio Officers (Resp. Br., pp. 44-48). Amici curiae take a similar position (NLRB Br., pp. 20, 22, 35; AFL-CIO Br., pp. 31-41). But those decisions neither establish that Congress intended the Board to correct the kind of abuse involved here nor do they even reflect this Court's considered judgment that the Board should have that power, and it is not in any event Petitioner's purpose to urge their abandonment.

As to Radio Officers, none of the three cases there decided involved hiring hall discrimination at all. While only one (Radio Officers) involved actual loss of a job, all the involved acts of discrimination on the part of the employer directed toward a person or persons already employed by him and undertaken at the urging of a union. The discrimination in each case thus came within the express prohibitions of Section 8(b)(2).

Phelps Dodge held simply that an employer discriminates in regard to hire no less when he refuses to employ a union member than when he terminates a member because of union membership. Since Phelps Dodge had nothing to do with union attempts to cause or attempt to cause an employer to discriminate in violation of Section 8(a)(3) that decision cannot be read as

deciding that when a union unilaterally denies one of its members a job referral, it violates Section 8(b)(2). Because Section 8(b)(2) forbids not direct union discrimination but rather attempts by unions to cause discrimination by employers, the correspondence which Respondents and the AFL-CIO maintain exists between Section 8(b)(2) and Section 8(a)(3) is too inexact to justify the conclusion that "Congress subjected unions to the same restrictions as employers" and therefore that "it necessarily subjected union operated hiring halls to regulation." (Resp. Br., p. 46; see also AFL-CIO Br. pp. 36-38.)

Teamsters Local 357 comes nearest supporting Respondents' position, since it contains language suggesting that hiring hall discrimination intended to encourage or discourage union membership may be reached by the Board (356 U.S., at pp. 676-677). But it is noteworthy that the language so indicating was essentially dictum and that the Board's power to redress hiring hall referral discrimination had not been an issue in the case. The incident out of which that case arose was the union procured discharge of a member who obtained a job directly from an employer with whom the union had entered into an exclusive hiring hall agreement. The issue was whether the Board could invalidate that agreement and declare unlawful union and employer conduct in conformance with it simply because it lacked affirmative antidiscrimination provisions. It is noteworthy as well that the Court's language went beyond that of the statute, for as already

indicated, Section 8(b)(2) does not in terms apply to direct or unilateral union discrimination. And most particularly is it worth observing that the Court expressly recognized Congress' very limited concern with regulation of hiring halls, pointing out that Congress' central aim was to prevent their use as an adjunct of the closed shop (356 U.S., at pp. 673-674).<sup>4/</sup>

Petitioner must again emphasize as he did in his Opening Brief (p. 72) that he has no dispute with the foregoing authorities even to the extent that they may expand the Board's regulatory jurisdiction beyond what Congress specifically contemplated when it enacted the Labor-Management Relations Act. Nor does Petitioner have any desire to roll back the body of Board law which purports to follow and apply those authorities. (See NLRB Br., pp. 30-33, 51-61.) Indeed, as Petitioner has learned from bitter personal experience, the worker whose

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To the extent that it purports to find in Section 8(b)(2) a mandate for Board regulation of unilateral union discrimination, Teamsters Local 357 represents an apparent departure from the construction given Section 8(b)(2) in International Association of Machinists v. Gonzales, supra, 356 U.S. 617, discussed in footnote 3, supra. It is likewise to that extent inconsistent with Radio Officers, which also reveals a clear sense that it is discrimination carried out by an employer at union behest which Congress intended Section 8(b)(2) to reach (347 U.S. at p. 42).



union has turned on him needs help from anyone who offers it. Moreover, particularly if the courts are to be ousted of all jurisdiction over cases as to which Board jurisdiction is only arguable, simple justice requires that the Board conscientiously exercise all of the power it even arguably may lay claim to.

Petitioner's point is not that wise policy militates against or that the terms of the Labor-Management Relations Act preclude Board regulation of the operation of hiring halls. Statutes are frequently construed and applied in ways which were not within the specific contemplation of their framers. Rather, Petitioner seeks only to establish that in light of the wording of Section 8(b)(2) and the virtual silence of the section's legislative history regarding the regulation of the operation of hiring halls, it is questionable whether Congress regarded such regulation as essential to the effective regulation of the process of employee self-organization and collective bargaining which was Congress' primary concern. This point will receive further consideration below.

b. Whatever Congress may have intended with respect to regulation of hiring halls, it is open to dispute whether the discrimination herein "encouraged" union "membership" even as those terms are broadly defined in Radio Officers.<sup>5/</sup> Petitioner will not elaborate here

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<sup>5/</sup> See p. 21.

his reasons for believing that the motivation for Daley's conduct toward him was predominantly personal animosity even if the animosity originally grew out of political rivalry.<sup>6/</sup> To the extent that its motivation was personal

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<sup>5/</sup>

It might be observed that Radio Officers' expansive definition of the term "membership" as used in Section 8(b)(2) -- a definition which reflects a broad conception of Section 7 rights (347 U.S., pp. 39-40) -- is difficult to square with the narrow construction given Section 8(b)(1)(A) in NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 179-195 (1967). There, Section 8(b)(1)(A)'s prohibition of coercion or restraint of employees in the exercise of their Section 7 rights was held to refer primarily to intimidation occurring in the course of organizing campaigns, a view necessarily implying a limited conception of Section 7.

<sup>6/</sup>

Respondents maintain that Petitioner both misstates the record and contradicts himself in urging (see Pet. Op. Br., pp. 50-51) that Daley's misconduct necessarily evidenced personal animosity which extended far beyond mere union considerations and which thus placed much of the conduct at the very periphery of the zone of behavior which Congress meant to commit to Board control (Resp. Br., p. 38). As is true, however, with Respondents' various other claims of inconsistency in Petitioner's positions (con't. p. 22)



hatred, the conduct obviously cannot have been intended to encourage union membership. A similar conclusion follows even if Daley's conduct was essentially in reprisal for Petitioner's political opposition to him, as Respondents insist (Resp. Br., pp. 38, 59-60). While the Board has concluded that Radio Officers authorizes it to reach conduct springing from such motives (NLRB Br., pp. 31-32) the legislative history is far from conclusive on the question<sup>7/</sup> and a union official who persecutes a political

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6/ (Con't. from p. 21.)

(Resp. Br., pp. 39-40, 44, 50, 61, 70) the assertion that Petitioner has contradicted himself flatly ignores Petitioner's clear meaning, as an examination of the positions said to be inconsistent will reveal. With respect to Petitioner's purported misstatement of the record, it is sufficient to point out that Respondents do not cite any portion of the record supporting a view contrary to that expressed by Petitioner.

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The Board in its brief provides only a single citation to the legislative history (see 2 Leg. Hist. of LMRA, p. 1062) indicating any intent to protect members against reprisals for political opposition to union leaders (NLRB Br., p. 21). Typically, even this portion of the legislative history refers to a discharge under a closed shop agreement following expulsion from the union.

rival cannot be said to have as his purpose the encouragement even of membership in good standing in the same sense as an official who imposes sanctions for an asserted breach of union rules, such as occurred in Borden and in Radio Officers.

c. How absolute and inflexible is Respondents' reading of Borden is nowhere revealed so clearly as in their contention that the one incident of direct interference with a job already promised to and all but possessed by Petitioner, for which the Board did allow a partial remedy, conclusively establishes the crux of the action, despite the fact that this one incident was a small part of the whole and despite the fact that the rest of Respondents' conduct was in significant respects very different from this single incident (Resp. Br., pp. 38-39). Respondents suggest that such a view as to the crux of the action is dictated by the presumption, developed in an entirely different context and for an entirely different purpose, that a verdict which might have been based on evidence improperly placed before the jury was in fact so based. This argument, of course, assumes the answer to the issue: whether any conduct which may be indisputably within the Board's jurisdiction is sufficient to taint all other conduct involved in the action, or whether the crux of the action is to be ascertained by examining the character of the major portion of the conduct.

Respondents further urge with respect to the single incident of direct job interference which resulted in a Board award that Petitioner's having sought and obtained a jury instruction to the effect that the Board had given him only back wages and could not redress other harms flowing from the incident somehow constituted reliance on Board law. This purported reliance is said to have been prompted by Petitioner's desire to use the Board's favorable determination to his advantage in this lawsuit and is represented as being so thoroughly at odds with the position Petitioner has taken on appeal that Petitioner should be estopped to claim that this one incident does not conclusively fix the crux of the action (Resp. Br., pp. 39-40). As is apparent, however, from a reading of the entire instruction [CT 533, App. 41-42] the purpose of the instruction was to indicate to the jury that the back pay awarded was at best incomplete relief, and that Petitioner had not already been made whole either with respect to that incident or as to the entire course of conduct at issue. Moreover, it is and has always been Petitioner's position not that this one incident did not constitute prohibited conduct but that the remainder of the conduct, which did not entail interference with an existing or promised job and which went on for so long as to call in question whether it sprang from primarily union considerations, could not automatically be so characterized. That position does not involve reliance on Board law in anything like the sense suggested by Respondents.

3. Respondents challenge Petitioner's reliance on International Association of Machinists v. Gonzales, 356 U.S. 617 (1958), cited in Garmon as an application of the exception to the preemption doctrine for matters of only peripheral federal concern (Pet. Op. Br., pp. 63-83). Gonzales is said to be distinguishable on the basis that although the expelled member there involved also sought damages for lost wages resulting from post-expulsion hiring hall discrimination, the crux of his action was restoration of his status in the union, a purely internal union matter, while the crux of this case, as in Borden, Iron Workers Union v. Perko, 373 U.S. 601 (1963) and Motorcoach Employees v. Lockridge, 403 U.S. 274 (1971) was interference with employment relations (Resp. Br., pp. 41-43). The Board advances a similar argument in its brief (NLRB Br., pp. 39-42).

This distinction, however, is simply unworkable, notwithstanding the fact that it has its origins in Borden, Perko and Lockridge. For while it may be true that the state courts in Borden and Perko awarded only damages and not restoration of membership rights, the state court in Lockridge, like that in Gonzales, awarded both. It can therefore hardly be said that Lockridge concerned internal affairs any less than did Gonzales. Moreover, Gonzales obviously did involve matters of employment, so that it cannot be said that that action was focussed solely upon the plaintiff's status as a union member.

Neither Respondents nor amici curiae make any effort to explain away the mentioned



difficulty with the internal affairs versus interference with employment relations distinction. In tacit recognition of the failings of that distinction, however, Respondents also advert to language in Lockridge distinguishing Gonzales on the ground that Gonzales turned on interpretation of the union constitution, while Lockridge turned upon construction of the union security clause in the collective bargaining agreement, as to which the Lockridge Court said federal concern was "pervasive" (Resp. Br., p. 43). This distinction, however, ignores the fact that the expelled member in Lockridge could have maintained an action for breach of the union's duty of fair representation based on the union's abuse of the same provision of the collective bargaining agreement. Such an action would not have been preempted, as the Lockridge Court itself pointed out (403 U.S., at pp. 298-299).<sup>8/</sup> It is difficult to see how it can be maintained that federal concern regarding union security clauses is "pervasive" when a lawsuit sounds in contract, as did Lockridge, but not when the same lawsuit, based on essentially the same operative facts and involving the same provision in precisely the same way, is prosecuted on a theory of breach of duty of fair representation. (See Cox, Labor Law Preemption Revisited, *supra*, 85 Harv. L.Rev.

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The fact that the suit might have failed for lack of proof of hostile motivation on the part of the union (see 403 U.S., at p. 300) is a wholly different matter. The lawsuit, even if not successful, would still not have been preempted.

at pp. 1370-1371.)

Precisely because the above distinctions between Gonzales on the one hand and Borden, Perko and Lockridge on the other are so unsatisfactory and because Gonzales has not been expressly overruled by this Court, Petitioner suggested in his opening brief that there existed other grounds on which the differences in result might be explained and he urged that these same grounds served to distinguish this case from Borden, Perko and Lockridge as well (Pet. Op. Br., pp. 68-73). Both Respondents (Resp. Br., pp. 49-51) and the Board (NLRB Br., pp. 42-44) dispute the suggested distinctions.

The first distinction -- that the conduct in Borden, Perko and Lockridge might be deemed either protected or prohibited, with the consequence that those cases posed issues peculiarly appropriate for the exercise of the Board's expertise in national labor policy, while the conduct in Gonzales and this case was by no means protected, and was either prohibited or arguably prohibited in the limited sense that it might be outside the Board's power to prohibit it (Pet. Op. Br., pp. 69-70) -- is challenged on the basis that the conduct herein could indeed have been found protected (Resp. Br., pp. 49-50; NLRB Br., p. 42). But as has been seen (see Section II(A) above), this contention assumes Respondents' version of the facts, which is a far different version from that necessarily found by the jury.



Petitioner's second distinction -- that the interference with existing job rights in Borden, Perko and Lockridge was different in kind from the pure referral discrimination in Gonzales and in this case,<sup>9/</sup> and that Congress, if it meant at all to reach the latter form of discrimination, must have regarded regulation of such discrimination as of peripheral importance at most (Pet. Op. Br., pp. 71-72) -- has met with denials but no reasoned response (Resp. Br., p. 50; NLRB Br., p. 43). This distinction finds substantial support not only in the terms of Section 8(b)(2) and the legislative history of that section but also in the language of the Gonzales decision itself, as has already been discussed in Section IIA2 and need not be reiterated here.

Petitioners' third distinction -- that the Board could have provided the same relief as did the courts in Borden, Perko and Lockridge, while in Gonzales and in this case it could not -- is attacked by Respondents and the Board as wrong on the facts and wrong on the law as well (Resp. Br., pp. 50-51; NLRB Br., p. 43).

As regards facts, it is pointed out that the state court in Borden had awarded a minute amount of punitive damages and that the state court in Perko possibly awarded damages for prospective as well as for past loss of earnings. But the negligible award of punitive damages in Borden is beside the point. As will appear from a reading of the entire passage of which Respondents quote only a part (Pet. Op. Br., p. 72) Petitioner urged simply that in Gonzales

and this case, the Board lacked the power even to make the plaintiff whole, while in Borden, as well as Perko and Lockridge, the compensatory relief allowed by the state courts was essentially what could have been obtained from the Board. As to Perko, it may or may not be that the damages awarded there encompassed loss of future earnings, as the AFL-CIO is frank to admit (AFL-CIO, p. 4). The original judgment, which was reversed upon appeal, had included such future earnings, but it is unclear whether the smaller sum awarded on retrial did the same. In any event, the distinction between back pay and future earnings is hardly one of substance. Had the plaintiff in Perko been the victim of further misconduct following an initial Board award of back pay, he could have returned to the Board for a new award of additional back pay.

As regards the law, Respondents assert that in adverting to forms of relief rather than forms of conduct, Petitioner ignores the square holding of Garmon that it is conduct and conduct alone which determines the crux of the action (Resp. Br., p. 51). What this argument overlooks is that that holding must be read as qualified by this Court's later clear pronouncement in Linn v. Plant Guard Workers, 383 U.S. 53, 63-64 (1966) that the Board's inability to provide effective redress for harms flowing from conduct which may be partly within Board competence is indeed a factor to be considered in determining whether an action involves matters of peripheral federal concern.

4. If the foregoing distinctions -- both those offered by Respondents and those tendered by Petitioner -- have a less than genuine ring to them, it is because Gonzales embodies a different view as to the proper distribution of power as between the federal government and the states than do Borden, Perko and Lockridge. In recognition of that fact, Petitioner attempted in his opening brief (see pp. 73-83) to show that Gonzales, more nearly than Borden, Perko and Lockridge, represents the balance which Congress meant to strike between state and federal power to redress union misconduct toward members. The crucial indication of Congress' intent, Petitioner suggested, was to be found in the Labor Management Reporting and Disclosure Act.

The significance of the Labor-Management Reporting and Disclosure Act in this regard cannot be too much emphasized. The bare existence of its savings provisions (see 29 U.S.C. §§ 413, 523(a)) establishes that Congress believed state remedies like those it was enacting had survived passage of the Labor-Management Relations Act, for there would not otherwise have existed any need to preserve such state remedies from the preemptive effect of the Labor-Management Reporting and Disclosure Act itself. The legislative history of those provisions is even more revealing. It shows that the provisions were a response to arguments of opponents of the new legislation that it would wipe out the even broader remedies (exemplified by Gonzales) already provided by state law (see Pet. Op. Br., pp. 74-77). It thus establishes a congressional consensus that such broader remedies did in fact

still exist and a congressional intent that they be preserved even to the extent that they provided greater protection to union members than the new legislation. Since this case, like Gonzales, plainly lies within the scope of the Labor Management Reporting and Disclosure Act (see Pet. Op. Br., pp. 96-108) and since even if it did not, it would incontrovertably come within the more extensive protections afforded by the body of state law (see Pet. Op. Br., pp. 77-83) which Congress indicated its desire to preserve, the conclusion inescapably follows that to hold this action preempted would not only not effectuate the congressional intent, but would run counter to it.

Significantly, neither Respondents nor the Board have uttered a word in reply to the foregoing points, thus evidently conceding the correctness of Petitioner's analysis. The AFL-CIO does attempt to explain away the Labor-Management Reporting and Disclosure Act (AFL-CIO Br., pp. 25-27), but without notable success. Neither Petitioner nor Mr. Justice White in his dissent in Lockridge (403 U.S., at pp. 321-323) suggest that the savings clauses roll back Garmon or extend Gonzales, as the AFL-CIO seems to believe (AFL-CIO Br., p. 27, fn. 23). The significance of those clauses and their legislative history lies in the fact that they constitute the clearest possible expression of Congress' own view as to the preemptive effect of the Labor-Management Relations Act.

The Labor-Management Reporting and Disclosure Act will be further discussed below.



5. Respondents and the Board also challenge Petitioner's reliance (Pet. Op. Br., pp. 56-63) on Linn v. Plant Guard Workers, supra, 383 U.S. 53 (Resp. Br., pp. 51-60; NLRB Br., pp. 36-39). Several of their points require reply.

a. Although neither Respondents nor the Board are particularly clear on the subject, it would appear that both wish to reason from language in Linn clearly declaring a new application of the exception for matters of peripheral federal concern to the conclusion that the case involves no exception at all. But Linn plainly does involve an exception to the Garmon principle and a far more significant one than they seem willing to admit.

In Linn the conduct in issue was a libelous statement by a union about management representatives published in the course of an organizing campaign and quite evidently meant to affect the outcome of that campaign. It can hardly be contended that organizing campaigns do not lie at the very heart of the scheme of regulation Congress established to bring a measure of peace to the process of employee self-organization. Indeed, nothing could come nearer the central aim of the federal legislation. The deleterious effects of excessive state intrusion into the process of employee self organization need scarcely be detailed, yet this Court saw little danger in permitting a libel suit by the maligned manager, so long as his action satisfied certain federal standards designed to minimize its potential for interference with the Board's jurisdiction.

b. It was Petitioner's position in his Opening Brief that the rationale of the Linn decision -- that the conduct there in question was reckless or intentional and did not in and of itself constitute an unfair labor practice, that the Board looks to separate and severable consequences of such conduct and that the Board lacks the power to provide effective redress to the affected individual -- was equally applicable to other varieties of tort action, including this one (Pet. Op. Br., pp. 56-57).

Respondents maintain that what Petitioner perceives to be the Linn rationale is not satisfied here because the conduct in question is in their view an automatic unfair labor practice (Resp. Br., p. 59). This argument is devoid of merit.

As already indicated above (Sections IIB2b and IIB3) and in Petitioner's Opening Brief (pp. 25-28, 49-51, 71-72) the conduct herein defies such facile classification. Indeed, when the instant case is compared with Linn, it is readily seen to be no less strong a case in this regard than Linn itself. Theoretically, the publication of libelous statements in Linn might have been found not to have violated Section 8 because at least arguably it did not spring from the requisite intent to coerce or mislead (383 U.S., at p. 63). On the other hand, it was equally arguable that the statements did violate Section 8, and the Linn Court plainly assumed the possibility that the Board, if asked to adjudicate the labor related aspects of the controversy might find the statements unlawful (383 U.S., at pp. 63-64, 66-67). Likewise here. If the



conduct herein is arguably within Section 8(b)(2), it is no less arguably outside that section since its motivation was in large measure unrelated to the encouragement of union membership and since the kind of hiring hall discrimination involved here is evidently not among the evils Congress was concerned to strike at when it enacted Section 8(b)(2).

c. Both Respondents (Resp. Br., p. 54, fn. 18) and the Board (NLRB Br., p. 38) suggest that the tort of intentional infliction of emotional distress somehow affects less compelling local interests than does the tort of libel, apparently because the former tort is of more recent vintage than the latter. But the fact that the tort of intentional infliction of emotional distress can not trace its lineage to the time of Henry IV and did not arrive at these shores on the Mayflower says nothing about the intensity of the state interest in preventing its commission or redressing its effects once it is committed. Times change and with them the law. Moreover, even assuming arguendo that this tort touches to a lesser extent upon local feeling and responsibility than does libel, so does it touch to a lesser extent upon matters clearly within the central aim of the Labor-Management Relations Act. Organizing campaigns are infinitely more closely bound up with the process of employee self-organization than is the operation of hiring halls, and Congress' concern with the regulation of the former is many times stronger than its concern with the latter.

C. RESPONDENTS' CONDUCT VIOLATED BOTH THEIR DUTY OF FAIR REPRESENTATION AND THE PROVISIONS OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT. WHETHER OR NOT THE JUDGMENT CAN BE DIRECTLY SUSTAINED ON THESE THEORIES, THE CASES DECIDED UNDER BOTH THEORIES ESTABLISH THAT THE CONDUCT HEREIN IS OF MERELY PERIPHERAL CONCERN TO THE FEDERAL SCHEME OF LABOR RELATIONS REGULATION.

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In his opening brief, Petitioner argued that since the conduct herein came within recognized exceptions to the Garmon rule for actions based on breach of the duty of fair representation or on violations of the Labor-Management Reporting and Disclosure Act, adjudication of this lawsuit by California's courts, even though those courts applied state law, could not be seen as posing any serious threat to the Board's implementation of national labor policy. He also suggested that even though the case had been tried under state law, the pleadings stated facts sufficient, if proved, to support recovery on either theory (Pet. Op. Br., pp. 84-85), that the

jury's favorable verdict on the evidence adduced and the instructions given necessarily included favorable findings on all but one of the material issues (Pet. Op. Br., pp. 85-89, 95, 104), and that there was every indication that if the remaining issue had actually been before the jury Respondents could not have prevailed on it (Pet. Op. Br., pp. 89-91, 105).

In their reply, Respondents concentrate virtually all of their fire on the second argument, characterizing it as an attempt to smuggle into the case issues not fairly comprised within the question which this Court granted certiorari to review, and arguing that Petitioner has failed to show how and where these issues were raised by him in the state courts and how they were there resolved (Resp. Br., pp. 61-63). Respondents also maintain that to uphold the judgment on either theory would deny them due process of law since the jury did not have the opportunity to pass upon the defenses Respondents might have offered had the case actually been tried on those theories (Resp. Br., pp. 64-69).

These contentions are wide of the mark.

a. The short answer to Respondent's jurisdictional challenge is that the issue presented for decision by this Court -- in substance, whether Petitioner's lawsuit ought to be deemed preempted (Pet. Cert., pp. 2-3) -- is entirely broad enough to encompass the grounds of affirmance now under consideration. Moreover,

as Respondents ought to be well aware, the contention that the verdict may be upheld on theories of violation of the Labor-Management Reporting and Disclosure Act and of breach of the duty of fair representation was advanced in both the Court of Appeal (see Petitioner's Resp. Br., pp. 48-62) and in the California Supreme Court (see Pet. Hg., pp. 25-32) and was rejected for reasons which neither court chose to express.

b. As to Respondents' due process argument, the idea of testing the verdict against theories other than that on which the case was tried is scarcely original with Petitioner. As a matter of fact, exactly this approach was taken in Lockridge, where, although the lawsuit had been tried and affirmed on appeal on a breach of contract theory alone, this Court evidently saw nothing to preclude it from considering whether the judgment of the state court could be upheld on duty of fair representation grounds (403 U.S., at p. 299).

Respondents to the contrary notwithstanding (Resp. Br., pp. 64-69), Petitioner has not urged that simply because his pleadings alleged facts which would support recovery under either of the two theories here under consideration, he is entitled to affirmance of the judgment on those theories. Petitioner's argument involves two steps, not one, just as the Lockridge Court's examination of the applicability of duty of fair representation law involved two steps rather than one.



In Lockridge, this Court first looked to the complaint to see if it could be construed to assert a claim for breach of the union's duty of fair representation. Petitioner did precisely the same in his Opening Brief (see pp. 84-85) and that was obviously his sole purpose in referring to the pleadings.

Once having concluded that the complaint could be construed as stating a cause of action for breach of the duty of fair representation, the Lockridge court then examined the evidence to see if it would support favorable findings on the material issues and determined that it would not (403 U.S., at p. 300). It is at this point that Petitioner's analysis of the instant case diverges from the analysis in Lockridge, it being Petitioner's view that the verdict herein necessarily disposed of virtually all of the issues arising under either theory in a manner favorable to Petitioner, and that as to the single remaining issue -- whether Petitioner had exhausted his internal union remedies -- Respondents not only failed to introduce any evidence which would have warranted a finding in their favor (even though they had every motive and opportunity to do so) but in all probability could not have produced such evidence, in light of their concessions in the course of discovery (see Pet. Op. Br., pp. 89-91, 95-96). While Respondents maintain that they could have introduced further evidence, both on this issue and other unspecified issues as well (Resp. Br., pp. 67-68) it is significant that they have failed to provide even the remotest hint as to the nature of that evidence. The fact is that essentially the same evidence was

relevant under all applicable legal theories and that, irrespective of legal theories, both sides produced all of the evidence they could come up with which might in any way aid their respective causes, as the voluminous record herein clearly demonstrates.

c. In any event, it was not Petitioner's sole purpose or even his primary purpose to establish that the judgment herein could be directly upheld on the subject theories. Indeed, his main point was that the precise conduct herein had been expressly exempted from the operation of the Garmon rule in cases decided under both of those theories (Pet. Op. Br., pp. 84, 85-89, 96-104) and that there was therefore no reason to preclude state courts from providing identical remedies under state law. As already noted, Respondents have scarcely bothered to reply to this branch of Petitioner's argument. To the extent that they have replied, their contentions not only fail to aid them, but actually further Petitioner's cause. The Board's supporting arguments are hardly better.

(1) In one footnote (Resp. Br., p. 61, fn. 20) Respondents seem to suggest that even though duty of fair representation law and the Labor-Management Reporting and Disclosure Act create federal causes of action to which Garmon has been expressly held not to apply, it does not follow that state tort law addressed to identical conduct should also be excepted from Garmon.<sup>10/</sup>

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<sup>10/</sup> (See p. 40.)



But this is patently incorrect. In the first place, as had already been seen (see Section IIB3, supra), the savings provisions of the Labor-Management Reporting and Disclosure Act (20 U.S.C., §§413, 523(a)) make it abundantly clear that Congress meant longstanding state remedies to coexist with the new federal remedies embodied in that legislation. Secondly, if the touchstone of preemption is in fact the nature of the conduct involved, as Respondents insist when it suits their purposes (see Resp. Br., pp. 51, 54-55; cf. Resp. Br., p. 43) it is difficult to see how it can matter whether it is state law or federal law which is applied to conduct as to which it is obvious that the concern of the Labor-Management Relations Act is tangential at most.

In the same footnote, Respondents try to explain away the exceptions in question on the ground that when a court determines that conduct violates the duty of fair representation or the Labor Management Reporting and Disclosure Act, that determination is irrelevant to the

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In the course of this argument, Respondents assert, incredibly, that "both exceptions result from deliberate Congressional judgments to create independent causes of action which may be maintained in the courts. . . ." While this is true as to the Labor-Management Reporting and Disclosure Act, it is not of the duty of fair representation, which is a creature of the courts (see Pet. Op. Br., pp. 85-86).

legality of conduct under the Labor-Management Relations Act. This observation proves too much, for Respondents fail to explain how a determination that the identical conduct amounts to a tort under state law is any more relevant to the issue of its legality under federal labor relations law. As a matter of fact, Linn justified an exception for malicious libel on the basis that a determination that statements were libelous would be essentially irrelevant to whether they were also violative of federal labor relations law (383 U.S., at pp. 63-64).

(2) In a second footnote (Resp. Br., p. 66, fn. 21) Respondents seem to argue that hiring hall discrimination cannot amount to a breach of the duty of fair representation, even though it constitutes a breach of the collective bargaining agreement, because when a union operates a hiring hall its authority to do so derives not from its status as exclusive bargaining representative, but from the collective bargaining agreement itself.

But this is sheer sophistry. The authority which the union enjoys under the collective bargaining agreement is the direct product of its exercise of its powers as exclusive bargaining agent.

Inexplicably, Respondents go on in the same footnote to urge that "[i]n that situation the union is responsible for the hiring decision and the employer is not implicated at all." Why the employer needs to be implicated in a breach of the duty of fair representation in

order for the union to be liable therefor is not explained. Moreover, a necessary corollary of this contention is that Section 8(b)(2), which as has been seen applies by its own terms only to union instigation of employer discrimination, does not forbid pure hiring hall discrimination. For if a union which unilaterally denies a hiring hall referral does not implicate the employer who has delegated the hiring function to it, the union can hardly be said to have caused the employer to discriminate in any way, shape or form. This is of course exactly contrary to Respondents' contention that Section 8(b)(2) does forbid pure hiring hall discrimination (see Resp. Br., pp. 45-49). Obviously Respondents cannot have it both ways.

This same footnote constitutes the only attempt Respondents make to deal with the authorities cited by Petitioner (see Pet. Op. Br., pp. 85-89) to demonstrate that the misconduct herein constituted a breach of Respondents' duty of fair representation, and even then it purports to distinguish only two of the cases. Richardson v. Communications Worker of America, 443 F. 2d 974 (8th Cir., 1971), which involved a protracted campaign of harrassment and a union procured discharge growing out of the plaintiff's opposition to misuse of union funds, is dismissed on the ground that it arose on extreme facts and is "to that extent completely inconsistent with the underlying theory of the duty." This delphic pronouncement, which is not further explained, states no cognizable distinction at all. Smith v. Sheet Metal Workers, 500 F.2d 741 (5th Cir., 1974), which involved hiring hall discrimination

like that herein, is said to be erroneous because it held that a duty of fair representation claim need not be founded on a breach of the collective bargaining agreement, a contention specifically refuted by Lockridge (403 U.S., at p. 299), and because the question of the union's duty to fairly represent members of the bargaining unit in the operation of the hiring hall was not squarely posed and decided therein, an argument refuted by examination of the opinion itself (500 F.2d 473-475).

(3) Curiously, Respondents do not devote even a footnote to Petitioner's discussion of the authorities decided under the Labor-Management Reporting and Disclosure Act (see Pet. Op. Br., pp. 96-105), even though the terms and legislative history of the Labor-Management Reporting and Disclosure Act provide the most potent possible indication that Congress meant to preserve state law addressed to the same conduct and did not intend the Labor-Management Relations Act to confer on the Board the exclusive power to regulate such conduct.

It bears observing that the Labor-Management Reporting and Disclosure Act is all the more significant here in light of Respondents' adamant insistence -- in order to bring this case within Section 8(b)(2) -- that the motivation for the misconduct herein was purely Petitioner's opposition to business agent Daley and his policies (Resp. Br., pp. 38, 53, 59-60). For to the extent that Respondents are correct in this regard, this case falls even more squarely within the provisions of the Labor-Management



Reporting and Disclosure Act. There is no need to reiterate here the copious authority cited in Petitioner's opening brief to establish that retaliation for exercise of the right to speak out about union affairs violates the Labor-Management Reporting and Disclosure Act and may be the subject of a wide range of remedies, including damages for mental anguish and punitive damages. To that authority need only be added two recent decisions: Miller v. Holden, 535 F. 2d 912 (5th Cir., 1976) [which establishes that union procuring of a member's discharge from his job does represent "discipline" within the meaning of Sections 101(a)(5) and 609 of the Labor-Management Reporting and Disclosure Act where the member's employment status is related to some internal union function, such as a hiring hall (or conversely, a union blacklist) and that even when the union's interference with the employment relations of a member does not qualify as "discipline" within the meaning of those sections, it may still "infringe" the member's rights within the meaning of Section 102] and Morrissey v. Maritime Union, 79 L.C., para. 21,406 [which, in affirming Morrissey v. National Maritime Union, 397 F. Supp. 659 (S.D.N.Y., 1975) cited at page 108 of Petitioner's opening brief, adds the Second Circuit to a growing number of circuits recognizing the right to punitive damages in Labor-Management Reporting and Disclosure Act actions].

D. TEAMSTERS LOCAL 20 v. MORTON PROVIDES A RULE OF DECISION SUPERIOR TO THE GARMON PRINCIPLE. APPLIED TO THIS CASE, THE MORTON RULE PLAINLY PERMITS THE MAINTENANCE OF THIS ACTION. WHOLLY APART FROM MORTON, DISPUTES BETWEEN MEMBERS AND THEIR UNION OUGHT TO BE EXEMPTED FROM THE OPERATION OF GARMON.

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In his opening brief, Petitioner suggested that if this lawsuit were in fact preempted under existing law, it was time to take another look at the law for reasons both of justice and ease of administration. Petitioner argued that a better test than that stated in Garmon for deciding whether state law is preempted in any particular case was the rule suggested by Professor Archibald Cox in his article Labor Law Preemption Revisited, 85 Harv. L.Rev. 1337 (1972) and derived from Teamsters Local 20 v. Morton, 377 U.S. 352 (1964): Whether the rule of state law sought to be invoked is an attempt to accommodate the same conflicting interests of employees, unions, employers and the public which Congress weighed when it enacted the Labor-Management Relations Act, or whether that rule is unrelated to labor relations as such (Pet. Op. Br., pp. 120-124). In the alternative, Petitioner



urged abandonment of Garmon in the limited area of member-union disputes and a return to the more even balance between state and federal power represented by Gonzales, a balance which is implicit in the limited concerns of the Labor-Management Relations Act and which Congress expressly indicated its desire to preserve when it enacted the Labor-Management Reporting and Disclosure Act (see Section IIB4, above; Pet. Op. Br., pp. 115-120).

In reply, Respondents maintain that Garmon is soundly reasoned (although they do not indicate why they so believe) and that Garmon was in any event tacitly approved by Congress in 1959 when it added Section 14(c) to the National Labor Relations Act (29 U.S.C. §164(c)). Respondents further argue that Morton and Garmon are not inconsistent and that in fact Morton, no less than Garmon, requires that the instant action be deemed preempted (Resp. Br., pp. 69-77). The AFL-CIO advances a more elaborate version of the contention that enactment of Section 14(c) constituted an approval of Garmon (AFL-CIO Br., pp. 6-24) and likewise suggests that Morton precludes the maintenance of the instant action no less than does Garmon (AFL-CIO Br., pp. 39-40).

These arguments are unmeritorious, for the following reasons:

1. Section 14(c) was a legislative attempt to resolve a far different problem than that presented here. As the AFL-CIO's copious quotations from the legislative history of Section 14(c) make plain, the sole issue under

consideration by Congress was whether the states should be free to resolve labor-management disputes refused by the Board not because they involved substantive issues only marginally within Board competence but because they involved employers not sufficiently engaged in interstate commerce to meet Board jurisdictional standards. That issue arose out of this Court's decision in Guss v. Utah Labor Relations Board, 353 U.S. 1 (1957). Not under consideration was the wholly distinct "no-man's land" arising under Garmon when the Board declines to adjudicate a labor-management dispute in an industry clearly affecting interstate commerce and the courts also refuse to touch it because the dispute might arguably be within Board competence. Likewise not under consideration was the problem of union-member disputes.

The most that can be said about Section 14(c) is that it represents Congress' partial solution to the former of the two "no-man's lands" just described. That partial solution to that limited problem was hardly an endorsement even of Guss. Even less was it an endorsement of Garmon, and still less of Borden, Perko and Lockridge.

It is true, as revealed by portions of the legislative history adverted to by the AFL-CIO in its brief (see p. 21), that the Garmon decision was handed down while Section 14(c) was under deliberation and that Congress was unquestionably aware of the decision. But because Garmon did not concern the same "no-man's land" as that on which Congress' attention was concentrated,

the failure of Congress to respond to the distinct problems raised by Garmon cannot be construed as a legislative approval of that decision. Moreover, since there was not the slightest clue in the Garmon decision (which, it must be emphasized, concerned a union-employer lawsuit) suggesting that the Garmon formula would be extended to member-union disputes in this Court's subsequent decisions in Borden, Perko and Lockridge, such approval of Garmon as might be found in congressional inaction regarding that decision cannot properly be said to apply to those later decisions. In fact, since Garmon cited with evident approval the then recent decision in Gonzales, congressional approval of Garmon logically entails approval of Gonzales as well. And in any event, if inaction alone constitutes legislative approval, Congress' failure to overturn Gonzales must be construed as direct approval of that decision.

2. Largely ignoring the logic of the Morton formula suggested by Professor Cox and concentrating principally on other aspects of Morton, Respondents urge that Morton precludes the instant lawsuit because it forbids use of state law to supplement Board remedies.

But Morton does not have the effect Respondents claim for it.

Morton grew out of secondary boycott activity violative of Section 8(b)(4). The victim thereof sued in federal court for compensatory damages under Section 303 of the Labor-Management Relations Act (29 U.S.C. §187), and

appended a further claim for compensatory and punitive damages under state law of secondary boycott, which to some extent purported to regulate conduct left unregulated by federal law.

This Court reversed the award of compensatory damages rendered under state secondary boycott law because Congress in reaching an accommodation of the various interests of the various parties to such activity had focussed upon but left unregulated the conduct to which such state law was addressed (377 U.S., at pp. 258-260). It is this portion of Morton on which Professor Cox' proposed preemption formula is based, and which Respondents decline to discuss.<sup>11/</sup>

This Court also overturned the award of punitive damages on the ground that both the language and the legislative history of Section 303 revealed Congress' intent that only compensatory damages be awarded for violation of that

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Respondents' silence on the merits of the Cox-Morton formula is all the more surprising in light of their express recognition (Resp. Br., p. 71, fn. 27) that several members of this Court have suggested a willingness to adopt that approach. (See concurring opinion of Mr. Justice Powell in Machinists v. Wisc. Emp. Rel. Bd., \_\_\_ U.S. \_\_\_, 92 LRRM 2881, 2884-2890 and concurring opinion of Mr. Chief Justice Burger in Taggart v. Weinacher's, Inc., 397 U.S. 223, 227-229 (1970).)



section (377 U.S., at pp. 260-261). It is this second portion of Morton on which Respondents rely.

The parallel between the punitive damages award overturned in Morton and the damages, both punitive and compensatory, allowed here is too imprecise, however, to justify the conclusion Respondents would draw. While the Board may not award the kinds of damages awarded here, the limitations on Board relief can hardly affect lawsuits only remotely touching on the Board's primary concerns in the same way federal limitations on damages in suits founded on federal law of secondary boycott affect damages awards under state law of secondary boycott. Not only are state and federal concerns more nearly congruent in the latter than in the former situation -- a fact which militates more strongly in favor of preemption -- but Section 303 constitutes a direct expression of a federal policy against awarding punitive damages in a lawsuit for unlawful secondary boycott activity, an expression which has no counterpart with respect to this kind of case. In fact, this Court's decision in Linn, and the decisions allowing a wide range of remedies (including damages for emotional suffering and punitive damages) in suits for breach of the duty of fair representation and violation of the Labor-Management Reporting and Disclosure Act (see Section II C, supra; Pet. Op. Br., pp. 91-95, 105-111) amount to a recognition of a contrary federal policy with respect to suits like this one.

3. Respondents (Resp. Br., pp. 70-71) and both amici curiae (AFL-CIO Br., pp. 4-5; NLRB Br., p. 47) argue that since Professor Cox suggests in a footnote that while he would overrule Lockridge, Borden and Perko might still be retained (85 Harv. L. Rev., at p. 1376, fn. 174), Petitioner would be no better off if this Court adopted Professor Cox' approach than under existing law.

This contention is meritless.

a. It is a peculiarity of the Cox article that having formulated a comprehensive new labor law preemption principle, Professor Cox declined to apply the new principle as fully to disputes growing out of internal union affairs as to true labor disputes. In fact, for reasons not altogether clear to Petitioner, he may not have meant it to apply to member-union disputes at all. (See 85 Harv. L. Rev., at p. 1359.)

Petitioner submits, however, that if under the Cox-Morton approach a rule of state tort law not aimed at the regulation of employee self-organization or collective bargaining as such can be applied to conduct which is not protected by federal law in a lawsuit between an employer and a labor organization (see Professor Cox' discussion of United Construction Workers v. Laburnum Construction Corp., 347 U.S. 656 (1954) at 85 Harv. L. Rev., 1358), there is logically no reason why a rule of state tort law likewise based on something other than local notions of sound labor policy should not be similarly applied to member-union members. Extended into this



area, the Cox-Morton principle would permit an injured member relatively full resort to state law of general application for harms done him by his union, except insofar as the union's conduct were actually protected. Obviously, there is no place in a world of which the expanded Cox-Morton principle is a part for such a distinction as that between torts accompanied by wrongful expulsion and torts not so accompanied.

b. In any event, even on the more limited approach which Professor Cox appears to have taken toward member-union disputes, it still must be concluded that this case should not be deemed preempted.

Professor Cox' approach in this area is an evident attempt to formulate a single rule which will take into account Congress' dual purposes in enacting Sections 8(a)(3) and 8(b)(2). On one hand, he points out, maintenance of membership agreements may be used as an organizing tool, in which case they impinge directly on employee self-organization. On the other, they may be used to enforce internal discipline, in which case their impact on employee self-organization may be remote at most. While Congress intended to reach both uses of such provisions, Professor Cox suggests, only cases involving predominantly the former use require preemption of state remedies. But since many cases contain elements of both, he reasons, a rule is needed which balances competing pro-preemption and anti-preemption policies (85 Harv. L.Rev., at pp. 1373-1374).

The rule proposed by Professor Cox is that state courts be permitted not only to reinstate expelled members but to award damages for resulting loss of employment. More significant than the bare rule, however, are the reasons he gives for adopting it. First, allowing a state court to award damages for loss of employment following expulsion poses no threat to national labor policy, he indicates, because such an award, even where it redresses different harms and is larger than a Board award of back pay, does not affect the balance of power between management and labor.<sup>12/</sup> (*Id.* at p. 1374.) This same reasoning applies no less clearly when the member is not expelled. Second, there is scant danger of different findings of fact or interpretations of relevant documents when a court awards damages in a suit for reinstatement. (*Id.*) This same reasoning applies equally when there is no expulsion. Third, the Board is simply not as concerned with individual injustice as it is with labor-management relations, and relief in the courts is likely to be quicker and more certain. (*Id.*) Plainly, the Board's concern is no

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In this regard, Professor Cox observes that "[s]urely the day has passed when unions may fairly say that they must be immune from paying damages lest such payment threaten their ability to function effectively. Nor is there other reason to suppose that Congress intended to limit the remedies available to the individual against the union." (85 Harv. L.Rev., at p. 1374.)

greater where no expulsion occurs, nor is Board relief any more likely to be as speedy or as reliable as a lawsuit.

It is against this rather expansive justification of a resurrected Gonzales exception that Professor Cox' observations about the possibility of continuing adherence to Borden and Perko must be viewed.

In suggesting that Borden and Perko might be retained, Professor Cox adverts not once but twice to the fact that the Board could handle the "whole controversy" in those cases and cases like them. Because Professor Cox is expressly concerned with the problem of injustice to the individual, these references appear to signal his belief not only that all substantive aspects of those controversies were within Board competence, but also that Board remedies would be adequate to make whole the involved members. Since the reasons he gives for permitting state courts to award damages in expulsion cases apply as well to cases in which there has been no expulsion and since he points to no overriding consideration which would require preemption in the latter cases, it is reasonable to assume that he would not require preemption in non-expulsion cases in which, as here, the Board's limited remedial powers would be inadequate to effect substantial justice.

### III

#### CONCLUSION

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For the foregoing reasons, it is urged that the writ of certiorari not be dismissed, that the decision of the Court of Appeal be reversed and that Petitioner's claim be held within the jurisdiction of the courts of the State of California.

Respectfully submitted,

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**No. 75-804**

**In the Supreme Court of the United States**

**OCTOBER TERM, 1976**

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**JOY A. FARMER, SPECIAL ADMINISTRATOR OF THE ESTATE  
OF RICHARD T. HILL,**

**PETITIONER**

**v.**

**UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF  
AMERICA, LOCAL 25, ET AL.**

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**ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF  
THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT**

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**BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD  
AS AMICUS CURIAE**

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**In the Supreme Court of the United States**

OCTOBER TERM, 1976

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No. 75-804

JOY A. FARMER, SPECIAL ADMINISTRATOR OF THE ESTATE  
OF RICHARD T. HILL,

PETITIONER

v.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF  
AMERICA, LOCAL 25, ET AL.

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ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF  
THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD  
AS AMICUS CURIAE

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INTEREST OF THE NATIONAL LABOR RELATIONS BOARD

The question presented in this case is whether the National Labor Relations Act (NLRA) preempts a state court suit for damages for emotional and physical distress brought by a union member against the union and its officials, alleging that they threatened to discriminate against him in referrals for employment out of the union hiring hall because of his intra-union political activity against the union leadership. Relying on this Court's decisions in *San Diego Building Trades*

*Council v. Garmon*, 359 U.S. 236, *Plumbers' Union v. Borden*, 373 U.S. 690, *Iron Workers Union v. Perko*, 373 U.S. 701, and *Motor Coach Employees v. Lockridge*, 403 U.S. 274, the court below held the action preempted by the NLRA. The National Labor Relations Board believes that this ruling is correct and should be upheld by this Court.

Protection of employees against discrimination in employment because of their union activities, whether caused by employers or unions, is central to the Board's regulatory function. The Board thus has a significant interest in the proper application of the preemption doctrine, which is designed to preclude interference with the uniform administration of federal law by conflicting state rules and remedies.

#### STATEMENT

The United Brotherhood of Carpenters and Joiners of America, Local 25 (the Union) operates an exclusive hiring hall for referral of carpenters in the Los Angeles area. In April 1969, Richard T. Hill,<sup>1</sup> a member of the Union, filed the instant action in the Superior Court of the State of California for the County of Los Angeles, seeking damages against the Union, the District Council and the International with which the Union was affiliated, and certain officials of the Union. Count two of the amended complaint alleged, *inter alia*, that (A. 9-10):

<sup>1</sup> Mr. Hill, the original petitioner in this case, died after the petition for a writ of certiorari was granted. This Court subsequently granted a motion to substitute Joy A. Farmer, special administrator of Hill's estate, as petitioner. For convenience, we occasionally use the term "petitioner" to refer to Hill.

Defendants \* \* \* made repeated oral threats to Plaintiff to the effect that as long as they controlled the job-dispatching procedures that Plaintiff would be and he was given inferior assignments and be bypassed for work assignments. \* \* \* Defendants \* \* \* repeatedly threatened Plaintiff with actual or defacto expulsion from the union in retaliation for his political activities, and further threatened to deprive [*sic*] Plaintiff of his ability to earn a living as a carpenter.

Defendants \* \* \* knew or reasonably should have known or expected that their outrageous conduct, threats, intimidation, and words would result in severe emotional, mental and physical damage to Plaintiff.

\* \* \* \* \*

As a proximate result of the intentional and wrongful discriminatory conduct practiced by Defendants, \* \* \* Plaintiff has suffered a nervous breakdown, grievous mental anguish and bodily injury making him sick, sore and lame \* \* \*.

Hill sought \$500,000 in actual, and \$500,000 in punitive, damages (A. 11).<sup>2</sup>

<sup>2</sup> Hill's complaint contained four separate causes of action. The trial court sustained a demurrer to the other three counts on the ground that federal law preempted jurisdiction over them (A. 19). The first count alleged that the Union actually discriminated against Hill in referrals for employment because of his dissident intra-union political activities; the third alleged that the Union breached the hiring hall provisions of the collective bargaining agreement between it and a contractor's association by failing to refer Hill on a non-discriminatory basis; and the fourth alleged that such failure to conform to the collective agreement also con-



Hill's attorney told the jury in his opening statement that "it is important that you understand the hiring hall mechanism \* \* \* so you can comprehend the nature of the conduct that followed" (A. 101). The bulk of the 2,800 pages of the trial transcript was devoted to the operation of the hiring hall (see, e.g., A. 77-87, 108-148, 272-338). Hill attempted to show its discriminatory operation, particularly as to him; the Union rebutted by attempting to show, *inter alia*, that Hill's lack of employment was due to his refusal to accept referrals or the refusal of particular employers to accept him for employment.

Apart from Hill's own testimony,<sup>3</sup> his case consisted largely of an examination of Business Agent Daley (A. 272-550). Relying on dispatch records from the hiring hall, Hill attempted to prove that Daley systematically awarded referrals out of turn to his political allies by such means as falsely representing that they had been orally requested by the employer to whose job they

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stituted a breach of the membership contract between Hill and the Union (A. 1-9, 11-15).

<sup>3</sup> Hill testified that he was elected in 1965 to a three-year term of office as vice president of the Union. Thereafter he began to disagree with Union Business Agent Earl Daley and other Union officials over certain internal union policies. As a result, Hill testified, he began to experience discrimination in referrals from the hiring hall, which caused him to complain about the operation of the hall both within the Union and to the District Council and the International. According to Hill, his complaints led to verbal abuse and threats of job discrimination by Daley and other Union officials, and to a continuation of the referral discrimination through such tactics as removing his name from the top of the out-of-work list and placing it at the bottom, referring him to jobs of short duration when more desirable work was available, and referring him to jobs for which he was not qualified (A. 149-154, 189-195, 238-242, 258-263).

were dispatched. Pe...ner also attempted to show that the Union's policy prohibited oral requests (A. 369) and that the hiring hall records did not support the contention that such requests had been made.<sup>4</sup>

Daley, on the other hand, contended that sloppy record keeping, rather than discriminatory treatment, explained why the records did not reflect the employer requests that accounted for the departures from the hiring hall sign-up lists (A. 293-383, 405-421, 441-462, 470-471). The Union also attempted to discredit Hill's contention that he was requested for a job to which he was not referred (A. 560-562, 575-576); to establish that Hill's priority on the list was legitimately dropped because he refused employment (A. 563-566, 590); and to show that he was an erratic and difficult individual whose lack of employment was a function of his own personality problems (A. 580-590).

In addition, it was shown at the trial that Hill had filed charges with the Board in May 1967, alleging that the Union discriminated against him in violation of Section 8(b)(2) and (1)(A) of the NLRA, 29 U.S.C. 158(b)(2) and (1)(A), by refusing to honor an employer's request that he be referred for employment to the Dinwiddy-Simpson construction job on the Crocker Citizens Bank Building. A complaint issued, an unfair labor practice hearing was held, and the Board awarded Hill \$2,517 in back pay. Hill testified that his filing of unfair labor practice charges led to further threats of

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<sup>4</sup> Employers were allowed to request a certain number of employees by name. The testimony was inconclusive as to whether such requests were required to be in writing (A. 145-148, 295-297, 298-301, 359-369, 572-574).

economic discrimination by Union officials (A. 241-247).

In its instructions to the jury, the trial court explained that the plaintiff had to prove that defendants "intentionally and by outrageous conduct inflicted upon plaintiff severe emotional distress" (A. 34). The court defined "severe emotional distress" as "any highly unpleasant mental reaction such as fright, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment or worry" (A. 40). Although the court instructed the jury that no damages could be awarded for lost wages (A. 41), it refused to give a requested instruction that the jury could not consider discrimination relating to Union dispatching procedures (A. 60). The court also instructed the jury that (A. 41-42):

There has been received in evidence the fact that Plaintiff filed a complaint within the National Labor Relations Board, a governmental agency, and received an award covering wages he would have earned on the Dinwiddy-Simpson job had he been dispatched on May 1, 1967.

The National Labor Relations Board is empowered by law to render awards to compensate for lost wages where it finds that a claimant was unreasonably denied employment in violation of certain applicable federal laws.

The Plaintiff in this action charges the intentional [infliction] of severe emotional distress and seeks damages for pain and suffering, for resulting medical expenses incurred, and for punitive damages. The National Labor Relations Board has

limited jurisdiction which does not include the authority to render awards for any of the just-mentioned items of damage.

The jury returned a verdict of \$7,500 actual damages and \$175,000 punitive damages against the Union, Daley, and the District Council (A. 68).<sup>5</sup> The trial court entered a judgment on the verdict (A. 67-69).

The California Court of Appeal reversed, holding, on the authority of *Garmon*, *Borden*, *Perko*, and *Lockridge*, *supra*, that the action was preempted by the NLRA (Pet. App. A1-A28). The court stated (Pet. App. A23):

The fact that in the case at bar Hill sought damages for mental anguish should not change the result here any more than such a claim for mental anguish changed the result in *Borden*, *supra* and *Lockridge*, *supra*. It is the "crux" of the causes of action, the "conduct" which is complained of which controls whether federal or state courts have jurisdiction, not the type of damage which is caused by such conduct.

The court added (Pet. App. A24):

Here there is no doubt in our view that the "crux" of the conduct of the defendants complained of by Hill related directly or indirectly to his employment and work assignments. The key allegation of his complaint was that the defendants "made repeated oral threats to the effect that as

<sup>5</sup> Hill voluntarily dismissed his complaint with respect to the International and one Union official, the court dismissed as to another official, and the jury found in favor of two other officials (A. 68).



long as they controlled job dispatching procedures that [Hill] would be *and he was given* inferior assignments and be bypassed for work assignments." (Emphasis ours.) \* \* \* That "as a proximate result of the intentional and wrongful *discriminatory conduct*" (emphasis ours) Hill suffered certain damages."

The Supreme Court of California denied review of the Court of Appeal decision (Pet. App. B1).

#### SUMMARY OF ARGUMENT

A. Under the principles established by this Court in *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, and recently reaffirmed in *Motor Coach Employees v. Lockridge*, 403 U.S. 274, the states may not regulate conduct that is "plainly within the central aim of federal regulation" (359 U.S. at 244) and that arguably is either prohibited by Section 8 or protected by Section 7 of the NLRA. The court below properly held the present suit preempted under those principles.

B. Count two of the complaint, upon which the award of damages in this case was predicated, alleged that the Union engaged in "oral threats" of discrimination against Hill in referrals for employment out of the hiring hall (established under the collective bargaining agreement) because of his dissident intra-union political activity. The opening statement of Hill's attorney to the jury emphasized that it was necessary to under-

\* Finally, the court found that, "[a]lthough the complaint in the case at bar makes casual reference to threatened union expulsion, it is clear that no expulsion in fact occurred and that the primary thrust of the complaint and the evidence (the 'crux' of the case) arguably constituted unfair labor practices" (Pet. App. A27).

stand the operation of the hiring hall in order to comprehend the nature of the wrong committed by the Union. Despite the Union's objections, the bulk of the testimony was devoted to describing the Union's dispatching procedures. The trial court refused to instruct the jury that it could not consider discriminatory hiring practices in reaching its verdict. In these circumstances, the court below properly concluded that "the 'crux' of the conduct of the [Union] complained of by Hill related directly or indirectly to his employment and work assignments" (Pet. App. A24). The threats and verbal abuse that allegedly caused Hill's emotional and physical distress were directly related to and inseparable from the claimed employment discrimination.

C. Section 7 of the NLRA grants employees the right "to form, join, or assist labor organizations," and the right "to refrain" from such activities. Sections 8(a)(1) and 8(a)(3) of the Act prohibit an employer from abridging Section 7 rights by restraint or coercion or by discrimination in employment "to encourage or discourage membership in any labor organization," and Sections 8(b)(1)(A) and 8(b)(2) similarly prohibit such conduct on the part of unions. These provisions embody a central "policy of the Act \* \* \* to insulate employees' jobs from their organizational rights. Thus §§ 8(a)(3) and 8(b)(2) were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood." *Radio Officers' Union v. National Labor Relations Board*, 347 U.S. 17, 40. In numerous cases, the Board,



with court approval, has found that a union engaged in discrimination proscribed by the Act by causing employees to be discharged or denied employment opportunities, or threatening to do so, either because the employees were not union members or because they had failed to comply with union rules or had incurred the displeasure of the union leadership.

At the same time, the Act recognizes the union's right to negotiate with the employer a contract provision making the union the exclusive source of referrals for employment and providing for referral on the basis of neutral criteria. *Local 357, Teamsters v. National Labor Relations Board*, 365 U.S. 667. A state may not prohibit such federally sanctioned referral systems.

D. Accordingly, if, as Hill alleged, the Union refused to refer him for employment, or referred him to undesirable jobs, because he had opposed the union leadership, such discriminatory use of the hiring hall constituted an unfair labor practice under Sections 8(b)(2) and 8(b)(1)(A) of the NLRA. The conduct complained of is no less an unfair labor practice because it allegedly embraced a series of acts occurring over a long period of time. Sections 8(b)(2) and 8(b)(1)(A) are not limited to single incidents of discrimination but also proscribe a course of actual or threatened discrimination. If, on the other hand, the Union were correct in asserting that it administered the hiring hall in a non-discriminatory manner and that Hill's failure to obtain work resulted from his refusal to accept legitimate referrals and his failure to abide by valid hiring hall regulations, then its administration of the hiring hall would be sanctioned by the Act.

Thus, all the considerations that underlie the *Garmon* doctrine are applicable here. The subject matter—the use of union hiring halls to effect job discrimination based on improper union considerations—is one with which Congress dealt directly and comprehensively in the NLRA. State regulation involves the danger not only of conflicting remedies, but also of inconsistent determinations of the lawfulness of the union conduct. The danger is enhanced here by the difficulty and complexity of the issues to be resolved.

The potential for impairing the federal regulatory scheme is not lessened by the fact that the state court applied its own tort law in place of NLRA substantive principles. “Regardless of the mode adopted, to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes.” *Garmon, supra*, 359 U.S. at 244. Nor is it significant that the state court awarded damages for injuries that the Board could not redress. Since “remedies form an ingredient of any integrated scheme of regulation, to allow the State to grant a remedy here which has been withheld from the National Labor Relations Board only accentuates the danger of conflict.” *Id.* at 247.

E. The present suit does not fall within the exceptions to *Garmon* recognized in *Linn v. Plant Guard Workers*, 383 U.S. 53, and *Machinists v. Gonzales*, 356 U.S. 617.

*Linn* sustained the power of a state court to award damages for malicious defamation occurring in a labor dispute. The Court did so because, “in spite of the force of the policies *Garmon* seeks to promote,” it

could not conscientiously presume "that Congress meant to intrude so deeply into areas traditionally left to local law." *Lockridge, supra*, 403 U.S. at 297. Moreover, it found that exercise of state jurisdiction over a defamatory statement "issued with knowledge of its falsity, or with reckless disregard of whether it was true or false" (*Linn, supra*, 383 U.S. at 61), "would be a 'merely peripheral concern of the Labor Management Relations Act'" (*ibid.*). In contrast, the tort of intentional infliction of emotional distress is a relatively recent cause of action whose roots in state law are not as deep as those of the tort of defamation. And a state remedy for "outrageous" conduct that is directly related to allegations of employment discrimination is not "peripheral" to, but imperils, the federal regulatory scheme.

In *Gonzales, supra*, the Court sustained the power of a state court to entertain a suit by a union member claiming that he had been expelled from the union in violation of the union's constitution and bylaws and to order both his reinstatement in the union and damages for wages lost due to the revocation of membership. However, *Gonzales* "was focused on purely internal union matters, i.e., on relations between the individual plaintiff and the union not having to do directly with matters of employment," and "the principal relief sought was restoration of union membership rights"; by contrast, the "'crux' of the action [here] concerned [Hill's] employment relations and involved conduct arguably subject to the Board's jurisdiction." *Plumbers' Union v. Borden*, 373 U.S. 690, 697.

F. Members of this Court and commentators have expressed reservations about the efficacy of the *Garmon* principles, particularly in the area of union-member, as opposed to labor-management, relations. We submit, however, that the considerations which prompted and support the *Garmon* doctrine warrant its continued application at least where, as here, the union-member dispute is not "focused on purely internal matters" but has to do "directly with matters of employment." *Borden, supra*, 373 U.S. at 697.

#### ARGUMENT

#### A STATE COURT SUIT FOR DAMAGES FOR ALLEGED DISCRIMINATION BY A UNION IN JOB REFERRALS IS PREEMPTED BY THE NATIONAL LABOR RELATIONS ACT

##### A. Under The *Garmon* Doctrine, The States Are Ordinarily Precluded From Regulating Activity Which "Arguably" Is Either Prohibited By Section 8, Or Protected By Section 7, Of The NLRA

In *Lodge 76, International Association of Machinists v. Wisconsin Employment Relations Commission*, No. 75-185, decided June 25, 1976, this Court observed that, in the labor relations area, "[c]ases that have held state authority to be pre-empted by federal law tend to fall into one of two categories: (1) those that reflect the concern that 'one forum would enjoin, as illegal, conduct which the other forum would find legal' and (2) those that reflect the concern 'that the [application of state law by] state courts would restrict the



exercise of rights guaranteed by the Federal Acts' " (slip op. 5-6). The first category involves "preemption based predominantly on the primary jurisdiction of the Board"; the preemption analysis in the second category "focus[es] upon the crucial inquiry whether Congress intended that the conduct involved be unregulated because left 'to be controlled by the free play of economic forces' " (slip op. 6-7). The present case involves essentially the first category of preemption.<sup>7</sup>

The line of analysis relevant to that category was developed in *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, and was recently reaffirmed in *Motor Coach Employees v. Lockridge*, 403 U.S. 274.<sup>8</sup> As the Court stated in *Lockridge* (*id.* at 288-289):

The rationale for pre-emption \* \* \* rests in large measure upon our determination that when it set down a federal labor policy Congress plainly meant to do more than simply to alter the then-

<sup>7</sup> *Lodge 76* involved the second category. The Court found that the union's refusal to work overtime in furtherance of its bargaining position was conduct that Congress intended to leave unregulated.

<sup>8</sup> In *Garmon*, the Court held that the NLRA preempted a state court suit by an employer, predicated on a tort theory, to recover damages for injuries caused by union picketing to compel recognition and execution of a collective bargaining agreement. In *Lockridge*, the Court held that the Act preempted a state court suit brought by an employee against the union to recover damages for violating the union's constitution and general laws (and thereby the membership contract between the union and the employee) by causing the employee to be discharged for failure to maintain good standing membership as required by the union security clause in the collective bargaining agreement.

prevailing substantive law. It sought as well to restructure fundamentally the processes for effectuating that policy, deliberately placing the responsibility for applying and developing this comprehensive legal system in the hands of an expert administrative body rather than the federalized judicial system [footnote omitted]. Thus, that a local court, while adjudicating a labor dispute also within the jurisdiction of the NLRB, may purport to apply legal rules identical to those prescribed in the federal Act or may eschew the authority to define or apply principles specifically developed to regulate labor relations does not mean that all relevant potential for debilitating conflict is absent.<sup>9</sup>

"Conflict in technique," the Court added, "can be fully as disruptive to the system Congress erected as conflict in overt policy. \* \* \* The technique of administration and the range and nature of those remedies that are and are not available is a fundamental part and parcel of the operative legal system established by the National Labor Relations Act" (*id.* at 287).

The foregoing policy considerations, the need for "a rule capable of relatively easy application, so that lower courts may largely police themselves" (*id.* at 290), and the failure of alternative approaches to the problem (*id.* at 290-291) led the Court to hold in *Garmon*, 359 U.S. at 244, and to reaffirm in *Lockridge*, 403 U.S. at 291, that:

<sup>9</sup> See also *Garner v. Teamsters Union*, 346 U.S. 485, 490-491.



When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by §7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law.

We shall show that, contrary to petitioner's contentions, (1) the crux of the state court complaint involved conduct "plainly within the central aim of federal regulation" (*Garmon, supra*, 359 U.S. at 244), either prohibited by Section 8 or protected by Section 7 of the NLRA; (2) the policy considerations that underlie the *Garmon* doctrine likewise justify a finding of preemption here; and (3) the suit does not come within the exceptions recognized in *Garmon*.<sup>10</sup>

<sup>10</sup> In *Garmon*, the Court indicated that it would not "find withdrawal from the States of power to regulate where the activity regulated was a merely peripheral concern of the Labor Management Relations Act . . . [o]r where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act" (359 U.S. at 243-244).

**B. The Crux Of The State Court Complaint Alleged, And The Proof Adduced Sought To Establish, That The Union Had Discriminated Against Hill In Job Referrals Because Of His Dissident Union Activity**

Count one of the complaint, to which a demurrer was sustained (n. 2, *supra*), alleged that the Union had discriminated against Hill in referrals for employment out of the hiring hall because of his dissident intra-union political activity. Count two of the complaint, the predicate for the jury's award of damages, essentially differs from the first count in only one respect: instead of alleging that the Union had actually discriminated against Hill in referrals for employment, it alleged that the Union engaged in "oral threats" of such discrimination (*supra*, p. 3).<sup>11</sup> Moreover, the purported proof of the threats alleged in count two involved essentially the same evidence as would be offered to prove the actual discrimination alleged in count one.

Thus, as shown above (pp. 4-5), Hill's attorney emphasized to the jury in his opening statement the importance of understanding the operation of the hiring hall in order to comprehend the nature of the wrong committed by the Union, and most of the testimony was devoted to that end. The trial court refused to instruct the jury that it could not consider discriminatory hiring practices in reaching its verdict (*supra*, p. 6). Indeed, petitioner now asserts that, in addition to "numerous and continuing threats," the evidence showed, "[m]ore significantly," that the campaign against Hill "involved refusal to dispatch

<sup>11</sup> Although count two also alleged that the Union "repeatedly threatened Plaintiff with actual or defacto expulsion from the union" (*supra*, p. 3), the court below found that "no expulsion in fact occurred" (Pet. App. A27).

Petitioner from the Local's hiring hall to any but the briefest and least desirable jobs, \* \* \* in contravention of long-established hiring hall practices" (Br. 6).<sup>12</sup>

In sum, under count two, no less than under count one, the jury was asked to evaluate the Union's operation of the hiring hall and, in particular, its treatment of Hill.<sup>13</sup> On this record, the Court of Appeal correctly concluded that "[h]ere there is no doubt \* \* \* that the 'crux' of the conduct of the [Union] complained of by Hill related directly or indirectly to his employment and work assignments" (Pet. App. A24).

<sup>12</sup> Petitioner contends (Br. 50) that the Union's misconduct encompassed not only job discrimination, but also a "steady barrage of insults, threats and vituperation and at least one minor battery." The only threat alleged in count two of the complaint is a threat of job discrimination (*supra*, p. 3). The alleged insults apparently refer to Hill's testimony that when he complained of hiring procedures Daley called him a "jerk," "knot-head," and "idiot" and told him "to take his book and clear out if he didn't like it" (Tr. 492; and see Tr. 504-505, 528-529). The alleged battery apparently refers to an incident in which Daley jostled Hill in the hiring hall because he thought Hill had called him a son-of-a-bitch (Tr. 1063-1064). Petitioner's further assertion (Br. 50) that the alleged union misconduct was not motivated by internal union dissension, but by "personal hatred and spite, indulged in for their own sake," is not borne out by the record. Petitioner's own evidence indicates that Daley habitually favored his political allies in making referrals from the hall and that Hill was not an isolated victim of referral discrimination (see *supra*, p. 4).

<sup>13</sup> This case thus does not present the question whether a state court would have power to award damages for emotional and physical distress resulting from threats or verbal abuse by a union official that are unrelated to, or separable from, alleged union action causing employment discrimination proscribed by the NLRA. Cf. *Alcorn v. Ambro Engineering, Inc.*, 2 Cal. 3d 493, 86 Cal. Rptr. 88, 468 P. 2d 216 (in which the preemption issue was not raised), and the other cases cited at Pet. Br. 58-59.

**C. The NLRA Bars Discrimination In Employment Directed At Union Members No Less Than At Employees Seeking To Join A Union; At The Same Time, The Act Permits The Operation Of Union Hiring Halls Based On Neutral Referral Criteria**

Petitioner's contention that the interests sought to be protected by the *Garmon* doctrine would not be impaired by permitting a state court to entertain and adjudicate the complaint here rests principally on two assumptions: (1) that, since the NLRA is basically concerned with organizational activity and collective bargaining, union discrimination in employment is outside the Act's scope except to the limited extent that the discrimination is motivated by organizational concerns (Br. 20-33, 49-50); (2) that there is no possibility that the Union conduct was either actually or arguably protected under Section 7 of the Act (Br. 41, 48-49). Both assumptions are incorrect.

1. Section 7 of the NLRA, as amended in 1947, grants employees the right "to form, join, or assist labor organizations," and the right "to refrain" from such activities. Sections 8(a)(1) and 8(a)(3) of the Act prohibit an employer from abridging Section 7 rights by restraint or coercion or by discrimination in employment "to encourage or discourage membership in any labor organization," and Sections 8(b)(1)(A) and 8(b)(2) similarly prohibit such conduct on the part of unions. A proviso to Section 8(a)(3) permits the employer and the union representative to enter into a union security agreement requiring employees to join the union after 30 days of employment, but



prohibits discharge under such agreements if membership "was not available to the employee on the same terms and conditions generally applicable to other members" or if "membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

These provisions, on their face, evidence a congressional intention to reach "every practice, act, source or institution which in fact is used to encourage and discourage union membership by discrimination in regard to hire or tenure, term or condition of employment." *Local 357, Teamsters v. National Labor Relations Board*, 365 U.S. 667, 676. The legislative history confirms that, in barring such discrimination, Congress sought to protect, not only employees who were seeking to join a union, but also those who were already union members. See Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1373 (1972).

In explaining Sections 8(a)(3) and 8(b)(2), and their relation to the proviso to Section 8(b)(1)(A)—which preserves the union's right "to prescribe its own rules with respect to the acquisition or retention of [union] membership" (see Pet. Br. 24-25)—the Senate Report stated (S. Rep. No. 105, 80th Cong., 1st Sess. 20, 1 Leg. Hist. 426):<sup>14</sup>

The committee did not desire to limit the labor organization with respect to either its selection of membership or expulsion therefrom. But the

<sup>14</sup> "Leg. Hist." refers to the Legislative History of the Labor Management Relations Act, 1947 (GPO, 1948).

committee did wish to protect the employee in his job if unreasonably expelled or denied membership.

The Report added that "unions are free to adopt whatever membership provisions they desire, but that they may not rely upon action taken pursuant to those provisions in effecting the discharge of, or other job discrimination against, an employee" (S. Rep. No. 105, *supra*, at 21, 1 Leg. Hist. 427).

On the floor of the Senate, Senator Pepper protested that Sections 8(a)(3) and 8(b)(2) would:

\* \* \* deny [to a union] the right to protect itself against a man in the union who betrays the objectives of the union, who violates, perhaps, the constitution of the union or the bylaws of the union, and is convicted by his peers and fellow members of having an antiunion and an antisocial attitude toward the workers in that organization. [93 Cong. Rec. 4193, 2 Leg. Hist. 1097.]

Senator Taft replied that the union would still be able to discipline a member; it could not, however, "make his employer discharge him from his job and throw him out of work" (*ibid.*).

Congress sought by these provisions to curb several specific instances of abuse made possible by a union's control over employment. Those abuses included causing the discharge of a member for testifying against a union shop steward,<sup>15</sup> for refusing to contribute to a union fund,<sup>16</sup> or for attempting to run for office

<sup>15</sup> S. Rep. No. 105, *supra*, at 6-7, 1 Leg. Hist. 412-413; 93 Cong. Rec. 3837, 4135, 4193, 4886, 2 Leg. Hist. 1010, 1062, 1096, 1420.

<sup>16</sup> 93 Cong. Rec. 4135, 4432, 2 Leg. Hist. 1062, 1199.



against incumbent officers.<sup>17</sup> Senator Taft, referring to "a member of a union who displays an antiunion attitude," stated (93 Cong. Rec. 4191, 2 Leg. Hist. 1094):

It is contended that the employer should be obliged to discharge the man because the union does not like him. That is what we are trying to prevent. I do not see why a union should have such power over a man in that situation.

In sum, these provisions embody "[t]he policy of the Act \* \* \* to insulate employees' jobs from their organizational rights. Thus §§ 8(a)(3) and 8(b)(2) were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood." *Radio Officers' Union v. National Labor Relations Board*, 347 U.S. 17, 40. "Congress recognized the validity of unions' concern about 'free riders,' i.e., employees who receive the benefits of union representation but are unwilling to contribute their share of financial support to such union, and gave unions the power to contract to meet that problem while withholding from unions the power to cause the discharge of employees for any other reason. \* \* \* No other discrimination aimed at encouraging employees to join, retain membership, or stay in good standing in a union is condoned." *Id.* at 41-42 (footnotes omitted).

Accordingly, in numerous cases (see App., *infra*, pp.

<sup>17</sup> 93 Cong. Rec. 4135, 2 Leg. Hist. 1062.

51-61),<sup>18</sup> the Board, with court approval, has found that a union has engaged in discrimination proscribed by the NLRA where it has caused employees to be discharged or to be denied employment opportunities, not only because of their lack of union membership, but because, though members, they had failed to comply with union rules or had incurred the displeasure of the union leadership.

2. While a union cannot by discrimination in employment opportunities encourage adherence to union rules and policies, Section 7 of the NLRA—in conferring on employees the right to select a union and, through it, to engage in collective bargaining—recognizes the union's right to negotiate with the employer a contract provision making the union the exclusive source of referrals for employment.

In *Local 357, Teamsters v. National Labor Relations Board*, 365 U.S. 667, the Court acknowledged that "the very existence of [a union] hiring hall encourages union membership" (*id.* at 675) and that Congress intended to regulate certain abuses (particularly the closed shop) that had occurred in their operation. The Court concluded, however, that Congress did not intend to outlaw hiring halls as such. Hiring halls, the Court stated, "ha[ve] served well both labor and management—particularly in the maritime field and in the building and construction industry. In the latter the contractor who frequently is a stranger to the area where the work is done requires a 'central source' for

<sup>18</sup> The appendix to this brief, *infra*, pp. 51-61, lists cases decided by the Board involving charges of unlawful discrimination growing out of union control over hiring or employment practices.

his employment needs; and a man looking for a job finds in the hiring hall 'at least a minimum guarantee of continued employment' " (*id.* at 672-673; footnotes omitted). The Court therefore held that a contractually sanctioned exclusive hiring hall was not unlawful under the NLRA in the absence of a showing that it was operated so as to prefer union members or those supporting union policies (*id.* at 676-677).

It has also been held that a union's demand for a contract clause providing that referrals for employment would be made exclusively through a union hiring hall, with the union selecting applicants on a non-discriminatory basis, is a mandatory subject of collective bargaining under Section 8(d) of the NLRA, 29 U.S.C. 158(d),<sup>19</sup> and thus beyond the authority of a state to prohibit. *National Labor Relations Board v. Tom Joyce Floors, Inc.*, 353 F. 2d 768, 769-771 (C.A. 9); *National Labor Relations Board v. Houston Chapter, Associated General Contractors of America, Inc.*, 349 F. 2d 449 (C.A. 5), certiorari denied, 382 U.S. 1026. Cf. *Local 24, Teamsters v. Oliver*, 358 U.S. 283.

3. The determination whether a hiring hall is being operated in a manner contrary to the congressional policy against employment discrimination often pre-

<sup>19</sup> See also Section 8(f) of the Act, 29 U.S.C. 158(f), which provides that it shall not be an unfair labor practice for a union and an employer engaged in the building and construction industry to enter into an agreement that "requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment," and that "specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area."

sents complex questions of fact and law. Facially neutral referral provisions may perpetuate previous unlawful practices<sup>20</sup> or, because of the character of the industry, may operate to prefer union members over non-members.<sup>21</sup> More typically, and as was alleged in the instant case, benign referral provisions may be administered in a discriminatory fashion.<sup>22</sup>

Moreover, the determination whether alleged instances of preferential referral actually are grounded in such lawful considerations as seniority, residence, skill, or experience, or instead are based on such unlawful considerations as union membership or loyalty to incumbent officers, often may involve difficult questions of fact.<sup>23</sup>

<sup>20</sup> See, e.g., *National Labor Relations Board v. Local 269, IBEW*, 357 F. 2d 51, 55-56 (C.A. 3).

<sup>21</sup> See, e.g., *National Labor Relations Board v. Local Union No. 450*, 281 F. 2d 313, 315 (C.A. 5), certiorari denied, 366 U.S. 909; and see *International Photographers of the Motion Picture Industries, Local 659*, 197 NLRB 1187, 1189-1190, enforced, 477 F. 2d 450 (C.A.D.C.), certiorari denied, 414 U.S. 1157.

<sup>22</sup> See, e.g., *International Longshoremen's Local 12*, 155 NLRB 1042, enforced, 378 F. 2d 125, 129 (C.A. 9); *United Industrial Workers of North America (Sea Land Service, Inc.)*, 207 NLRB 958; *Local 383, Lathers Union*, 176 NLRB 410.

<sup>23</sup> In the following cases, the Board dismissed allegations of discrimination based on dissidence or ill will of union agents as unsupported by the evidence: *Local Union 456, Electrical Workers*, 183 NLRB 1277, n. 1, 1278-1280; *Plumbers Local 454*, 176 NLRB 896, 900-902; *Plumbing & Pipefitting Local 389 (Scheurer Engineering Co., Inc.)*, 176 NLRB 402, 404-405; *Int'l Hod Carriers, Building, etc., Local 341*, 146 NLRB 1358, 1370-1371. Compare the following cases, where discriminatory treatment of dissidents was found as alleged: *Carpenters District Council of New Orleans*, 182 NLRB 49, 56; *National Maritime Union*, 177 NLRB 615, 627-630, enforced, 423 F. 2d 625 (C.A. 2); *Int'l Assoc. of Bridge, etc., Workers, Local 350*, 164 NLRB 644.



Finally, assessing the lawfulness of referral preference criteria may implicate questions of policy. Referral criteria must be rational, non-arbitrary, and non-invidious. The Board must determine whether the union has a legitimate purpose in using the challenged criteria and, if so, whether that purpose is sufficient to outweigh the resultant injury to employee rights.<sup>24</sup>

These "difficult and complex" questions bearing on "the operation of union hiring halls \* \* \* point up the importance of limiting initial competence to adjudicate such matters to a single expert federal agency." *Plumbers' Union v. Borden*, 373 U.S. 690, 695-696.

4. The Board's remedial powers under Section 10(c) of the NLRA, 29 U.S.C. 160(c), enable it to provide effective curative measures for widespread acts of hiring hall discrimination. The Board can order the union and the employer (if it is implicated in the

<sup>24</sup> For example, preference based on residence is lawful because unions have a legitimate interest in protecting work opportunities in the unit they represent. But preference based on the citizenship and residence of the employee's family has been held by the Board to be an invidious and arbitrary classification. *International Longshoremen's Association Local 1581*, 196 NLRB 1186, enforced, 489 F.2d 635 (C.A. 5), certiorari denied, 419 U.S. 1040. Similarly, the Board has held that a union may legitimately refuse referral to a person who maintains a contracting establishment in the same field. "Such a requirement appears reasonable as an effort to assure that the employment opportunities for those who, day in and day out, are rank-and-file employees, are not prejudiced by competition from those who have operated, and intend in the immediate future to operate, as contracting employers." *Lower Ohio Valley District Council of Carpenters, Millwrights, Local 1080*, 201 NLRB 882, 883. However, a union may not deny an employee referral because she has transgressed the union membership requirement not to work for a non-union employer. *Waitresses' Union No. 276*, 186 NLRB 484.

unlawful discrimination) to make whole any employee discriminated against by paying lost wages with interest.<sup>25</sup> It can order the discriminatees reinstated to their rightful preference in the hiring hall classification scheme.<sup>26</sup>

The Board can also issue a "broad" cease and desist order that runs not only against the union's treatment of the employees immediately involved, but also against similar conduct involving any other employee or employer,<sup>27</sup> and it can monitor the union's adherence to its orders by requiring the keeping and inspection of adequate records to disclose the basis on which employees are referred out of the hiring hall.<sup>28</sup> Finally, failure to abide by court-enforced Board orders is punishable by civil and criminal contempt.<sup>29</sup>

<sup>25</sup> See, e.g., *Carpenters Union Local 180*, 175 NLRB 927; *Asbestos Workers, Local 53 (McCarty & Armstrong)*, 185 NLRB 642; *Williams Press, Inc.*, 195 NLRB No. 905. And see *Local 370, Operating Engineers*, 224 NLRB No. 94, 92 LRRM 1568 (hiring hall discriminatee compensated for estimated loss of call-back dispatches he would have received but for discrimination, as well as for losses directly attributed thereto).

<sup>26</sup> See, e.g., *National Labor Relations Board v. Operating Engineers Local 542*, 485 F.2d 387, 391, 393 (C.A. 3).

<sup>27</sup> See, e.g., *National Labor Relations Board v. Local 542, Operating Engineers*, 329 F.2d 512, 515-516 (C.A. 3).

<sup>28</sup> See, e.g., *Castleman & Bates, Inc.*, 200 NLRB 477, enforced sub nom. *National Labor Relations Board v. Local 17, Sheet Metal Workers*, 87 LRRM 3274 (C.A. 1); *Local 138, Operating Engineers v. National Labor Relations Board*, 321 F.2d 130, 138 (C.A. 2).

<sup>29</sup> For example, in *National Labor Relations Board v. Ironworkers, Local 86*, 79 LRRM 2723, the Ninth Circuit, in a civil contempt proceeding, established a detailed hiring hall procedure that the union was required to follow, specifying the criteria for preference, the times the hall must be open for registration, and the referral procedure. The decree required the union to maintain



**D. The Union Action Complained Of Was Either Prohibited By Section 8, Or Protected By Section 7, Of The NLRA; Under The *Garmon* Doctrine, State Regulation Was Thus Foreclosed**

1. If, as Hill alleged, the Union refused to refer him for employment, or referred him to undesirable jobs, because he had opposed the union leadership, such discriminatory use of the hiring hall would clearly have constituted an unfair labor practice under Sections 8(b)(2) and 8(b)(1)(A) of the NLRA.<sup>30</sup> Indeed, on the charge that Hill filed with the Board covering one incident of such discrimination, the Board found a violation of those provisions and ordered that Hill be compensated for lost wages.<sup>31</sup>

sufficient records to monitor the operation of the hall. Moreover, the court appointed the president of a local bar association as "Investigating Referee" with authority to resolve complaints concerning operation of the hall and, subject to the approval of the Board's Regional Director, to recommend changes in its operation. *Id.* at 2725-2726. Failure to comply with the decree would result in a \$5,000 fine for each unlawful occurrence, and a \$500 per day penalty so long as the unlawful activity continued. *Id.* at 2724.

<sup>30</sup> See, e.g., *United Industrial Workers of North America (Sea Land Service, Inc.)*, 207 NLRB 958; *Operating Engineers, Local 18*, 205 NLRB 901, enforced, 500 F. 2d 48 (C.A. 6); *National Maritime Union*, 177 NLRB 615, enforced, 423 F. 2d 625 (C.A. 2); *United Brotherhood of Carpenters, Local 1281*, 152 NLRB 629, enforced, 369 F. 2d 684 (C.A. 9).

<sup>31</sup> As the court below stated (Pet. App. A23):

In the case at bar we are not required to speculate whether or not the wrongs which Hill complains of were "arguably" within the jurisdiction of the N.L.R.B. Here the N.L.R.B. did in fact assume jurisdiction, it did find that Local 25 was guilty of unfair labor practices in making work assignments of Hill in the Dinwiddy-Simpson job for the construction of the "Crocker Citizens Bank" building and awarded Hill \$2,517 back wages for discriminating conduct with reference to that

On the other hand, contrary to petitioner's suggestion (Br. 41), the Union never conceded that its conduct was not protected by the Act, nor does the record establish that the Union's conduct "indisputably proceeded from a desire to inflict retribution upon Petitioner for his political opposition to Daley" (Br. 49). The Union vigorously contended that it administered the hiring hall in a non-discriminatory manner; it attempted to show that Hill's failure to obtain work resulted from his refusal to accept legitimate referrals and his failure to abide by valid hiring hall regulations (see *supra*, p. 5). If the Board were to find that, apart from the refusal to refer Hill to the Dinwiddy-Simpson job (n. 31, *supra*), the Union's assertions were valid, its administration of the hiring hall, in major part, would be sanctioned by the Act.<sup>32</sup>

job. Hill filed other charges of unfair labor practices with the N.L.R.B. but voluntarily withdrew them.

We presume that the N.L.R.B. would have correctly decided the additional matters and would have granted the relief, if any, to which Hill was legally entitled if Hill had pursued the matter further before the N.L.R.B. But Hill was apparently dissatisfied with the award of \$2,517 from the N.L.R.B. and sought the more generous bounties of a common law jury.

<sup>32</sup> A union may lawfully seek the discharge of employees who have been hired in contravention of a valid hiring hall agreement. See e.g., *Hod Carriers & Construction Laborers' Union Local 300*, 145 NLRB 1674, 1678, enforced, 392 F. 2d 581 (C.A. 9); *Boston Cement Masons & Asphalt Layers Union No. 534 (Duron Maquire Eastern Corp.)*, 216 NLRB No. 90, 88 LRRM 1348; *Local 673, Laborers International Union*, 171 NLRB 894, 899. And it may properly refuse to refer applicants who do not meet valid hiring criteria. See, e.g., *Local 825, Operating Engineers*, 187 NLRB 50; *Pacific Maritime Association*, 155 NLRB 1231, 1234-1235; *Pacific Maritime Association*, 172 NLRB 2055, 2055-2056; *Int'l Association of Iron Workers, Local 229*, 183 NLRB 271. There are many valid hiring criteria that might justify referring some applicants

2. Nor is the conduct complained of any less an unfair labor practice because it "was not a single act but rather embraced a series of acts of varying character occurring over a period of more than two years" (Pet. Br. 39), or because it was not limited to "a job already possessed by the employee" but involved a "[c]ontinuing refusal to dispatch Petitioner from the hiring hall" (Br. 71). Sections 8(b)(2) and 8(b)(1) (A) of the NLRA are not limited to single incidents of actual discrimination, but also proscribe a course of discrimination<sup>33</sup> as well as threats of discrimination.<sup>34</sup>

Indeed, many unfair labor practice cases adjudicated by the Board have involved situations similar to those alleged by Hill—i.e., a continuing pattern of union job discrimination against an employee-member because of his disfavor with the union leadership<sup>35</sup>—and some reflect a sharp contrast between the approach of the Board and that of the trial court in the present

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for employment in preference to others. For example, applicants for referral may be ranked on the basis of seniority (*Local 928, ILA (Marine Terminals)*, 186 NLRB 1044, 1046); residence (*Everett Construction Co.*, 186 NLRB 240; *Metropolitan District Council, Carpenters*, 194 NLRB 159, n. 2; cf. *Rondicken, Inc.*, 198 NLRB 100, 102-103); or skill or experience (*Local Union No. 40, Sheet Metal Workers*, 199 NLRB 1058, 1062-1063; *Walter J. Barnes Electrical Co.*, 188 NLRB 183, 184; cf. *Ashley, Hickham-Uhr Co.*, 210 NLRB 32).

<sup>33</sup> See, e.g., *Operating Engineers, Local 406*, 189 NLRB 255, 258-264; *Int'l Ass'n of Bridge, etc., Workers, Local 350*, 164 NLRB 644, 645-650; *Local 1486, Brotherhood of Painters*, 132 NLRB 803, 818-826.

<sup>34</sup> See, e.g., *Master Stevedores Association of Texas*, 156 NLRB 1032, 1036-1037; *Plumbers Union No. 137*, 207 NLRB 359, 367; *Heavy Construction Laborer's Local 663 (Treuner Construction Co.)*, 205 NLRB 455, 459, and cases cited therein at n. 27.

<sup>35</sup> See the cases marked with a single asterisk in the appendix to this brief, *infra*, pp. 51-61.

case in assessing the legality of the union's conduct.

In *Laborers, Int'l Union, Local 207*, 206 NLRB 902, for example, the Board was called on to decide whether a union's refusal to refer an employee to various jobs was due to his "clashes over the [operation of] the referral system" (*id.* at 904) or to a non-discriminatory referral priority enjoyed by other employees. In finding that it was due to the former, and therefore that the union was guilty of an unfair labor practice, the Board considered the evidence of union animus against the individual and reviewed the referral system's operation and the union's explanation of its operation (*id.* at 905). In *Operating Engineers, Local 406*, 189 NLRB 255, 257-265, the Board's finding that union dissidents were impermissibly disfavored rested on its assessment of the operation of a complicated referral system in the face of allegations concerning at least 32 specific instances of refusals to refer. *Id.* at 259. In *Operating Engineers, Local 18*, 205 NLRB 901, the Board found a violation of the Act where the incumbent union leadership waged a campaign "to starve out \* \* \* the dissidents" (*id.* at 911, 913) by threatening physical and economic retaliation and by discriminatorily dropping a dissident to the bottom of the referral list on grounds that he refused proffered employment, when in fact the dissident-applicant had valid medical grounds for so refusing. *Id.* at 911. And, in *Carpenters District Council of New Orleans*, 182 NLRB 49, after an exhaustive review of the pertinent hiring practices, the Board concluded that three dissidents "were denied referrals \* \* \* not because they had been lax in making a timely bid for that work, but because [the union] sought to punish them for pursu-



ing a course in opposition to the intraunion political ambitions of the incumbent officers." *Id.* at 56.<sup>36</sup>

On the other hand, in *Plumbers Local 454*, 176 NLRB 896, the Board rejected the allegations of a union dissident that he had been discriminated against in referrals because of his internal political activity. The Board noted (*id.* at 902): "It may be \* \* \* that [the business agent] in operating the referral system \* \* \* on occasion made referrals that constituted favored treatment of particular members of Local 454. But this is not the issue in the case. The issue is whether the referrals were connected with [his] supposed animus against [the dissident] arising from the latter's alleged union activities and were motivated by [the business agent's] desire to punish [him] because of them." In reaching its decision, the Board resolved issues of credibility against the employee "who appears to have a persecution complex, and to be given to the making of threats of bodily violence and to wild exaggerations, often distort[ing] the truth \* \* \* ." *Id.* at 900.<sup>37</sup>

Similarly, in *Local Union 456, Electrical Workers*,

<sup>36</sup> See also *Local 513, Int'l Operating Engineers*, 199 NLRB 921, 922, 924 (rejecting union's contention that an applicant who had a dispute with the business agent was denied referral because he lacked the requisite experience rather than because of hostility on the part of the agent); *Local 1098, Carpenters*, 186 NLRB 385, 389-390 (finding discrimination against dissidents despite union's defense that the employer's request for the particular employees was not in accord with the contractual preferential hiring system).

<sup>37</sup> Here, the trial court instructed the jury that Hill merely had to prove that the defendants had "intentionally and by outrageous conduct" inflicted "severe emotional distress"; the court defined "severe emotional distress" as "any highly unpleasant mental reaction such as fright, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment or worry" (*supra*, p. 6).

183 NLRB 1277, the Board, rejecting a claim of discrimination, found that the union was legitimately referring lower listed applicants because they were requested by name by particular employers. The Board stated that "the foregoing general pattern of skipping over applicants militates against [the theory] \* \* \* that [the union] singled out [the dissident] for disparate treatment in the matter of referrals because of his long-standing feud with [the union's] sister local or because of the charge filed by him against [the union] \* \* \* ." *Id.* at 1279.<sup>38</sup>

3. All the considerations that underlie the *Garmon* doctrine are therefore applicable here. The subject matter—the use of union hiring halls to effect job discrimination based on improper union considerations—is one that Congress dealt with directly and comprehensively in the NLRA. State regulation could result not only in conflicting remedies for conduct that may be clearly unlawful, but also in inconsistent rulings concerning the propriety of conduct only arguably unlawful.

The danger of conflicting judgments concerning the lawfulness of the union conduct in this case—and the need in this field for evaluation of the facts by an experienced, expert tribunal in order to achieve a reasonably consistent course of adjudication—is intensified by the difficulty and complexity of the issues to be resolved. Moreover, the state court here applied, not NLRA substantive principles, but state tort law, under

<sup>38</sup> Here, too, the evidence focused primarily on widespread favoritism in referrals rather than on discrimination specifically directed at Hill (*supra*, p. 4).



which the jury was given broad discretion to make a subjective judgment whether the Union's conduct was "outrageous" (see p. 6, *supra*). As the court below pointed out (Pet. App. A25):

The very purpose of having one uniform national policy administered by a single specially constituted tribunal would be completely frustrated and defeated if it were legally permissible for juries in the fifty different state tribunals to award different amounts of damage for conduct which is essentially within the jurisdiction of the N.L.R.B. A labor union could be completely wiped out financially by such awards resulting in substantial detriment to other innocent union members whose livelihood depends upon continued union representation. \* \* \*

The threat of such jury verdicts could chill unions in the exercise of rights protected by the NLRA. The Act gives a union the right to operate a hiring system under which applicants for employment are referred on the basis of objective criteria unrelated to "union considerations" (see *supra*, pp. 23-24). Although a union is not permitted under such a system to discriminate against an employee because he is a dissident, neither is it required to give preference to an employee because he is a dissident. Yet, if the union's reasons for failing to refer a dissident were subject to review, not only by the National Labor Relations Board, but also by state courts and juries, the union could not depend upon definitive Board adjudication of the controversy. Cf. *Beasley v. Food Fair of North Carolina, Inc.*, 416 U.S. 653. Faced with the risk of substantial state court

damage judgments, the union might well be prompted to "play it safe" by referring for employment dissidents who, for valid reasons, would not otherwise have been referred.<sup>39</sup> Cf. *Letter Carriers v. Austin*, 418 U.S. 264, 277.

Finally, the Board's decisions reflect instances in which employers not only have discriminated against employees because of their union activity, but also have engaged in other conduct against them—*e.g.*, surveillance, harassment, humiliation—that could reasonably be viewed as "outrageous" and be found to have caused emotional or physical distress.<sup>40</sup> If state courts were

<sup>39</sup> This would prejudice other employees who were ahead of the dissidents under the normal referral criteria, and could, in turn, subject the union to suits by those employees.

<sup>40</sup> See, *e.g.*, *Zinke's Foods, Inc.*, 185 NLRB 901, 905-907, enforced, 463 F. 2d 316 (C.A.D.C.) (employee union adherent forced to quit when employer's harassment made him ill); *Retail Store Employees Union Local 880 v. National Labor Relations Board*, 419 F. 2d 329, 332 (C.A.D.C.) (employee union activist made ill and forced to quit by "humiliating and onerous conditions imposed" on her in her job as part of employer's "continuing effort to undercut the Union"); *Holly Bra of California*, 164 NLRB 1112, 1121, enforced, 405 F. 2d 870 (C.A. 9) (employer's program of "discriminatory harassment of [union activist employee], consisting of baseless faultfinding, requirement of unnecessary 'repairs' . . . and humiliating 'piece by piece' inspection of her work," resulted "in emotional upset for her, leading her to absent herself for that reason for about a month" and causing her to become "'sick from my nerves'"); *Lipman Bros., Inc.*, 147 NLRB 1342, 1344-1345, 1361 (employee with heart condition forced to do heavy work); *National Labor Relations Board v. Ritchie Mfg. Co.*, 354 F. 2d 90, 98 (C.A. 8) (employer attempted "to hasten the departure of [union activist] as an employee" "through systematically placing him for an indefinite period on a job known to cause him illness"); *Saxe-Glassman Shoe Corp.*, 97 NLRB 332, 333-334, 349-351, enforced, 201 F. 2d 238, 243 (C.A. 1) (constant interrogation of union activist caused her mental distress which, in turn, prompted her to quit); *Beiser Aviation Corp.*, 135 NLRB 450, 451 (employer intentionally made employee "object of ridicule and

held to have jurisdiction over suits against unions to recover damages for this kind of injury, even when it is directly related to conduct regulated by the NLRA, state courts arguably would have jurisdiction over similar suits against employers. If Section 8(b)(2) unfair labor practice charges against a union could be retried in a state court whenever verbal abuse or similar "outrageous" conduct is enmeshed with employment discrimination caused by the union, then Section 8(a)(3) unfair labor practice charges against an employer might well similarly be subject to state court retrial when such conduct is enmeshed with discrimination caused by the employer—thus further undermining the *Garmon* principle.

**E. The Recognized Exceptions To *Garmon* Are Not Applicable Here**

1. Petitioner contends (Br. 56-63) that the instant suit is analogous to *Linn v. Plant Guard Workers*, 383 U.S. 53, and *Automobile Workers v. Russell*, 356 U.S. 634, in which the Court found exceptions to the *Garmon*

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harassment" by fellow employees, in reprisal for union activities); *Becton-Dickinson Co.*, 189 NLRB 787, 787-789, 794-795 (pro-union employees forced to quit because of harassment by anti-union employees which caused emotional distress and physical illness; employer acquiesced in such practices as putting dead mice in a pro-union employee's coat pockets and sending him "derogatory and obscene notes"; employer also transferred another pro-union employee to jobs employer knew he was physically unable to do); *Dodson IGA Foodliner*, 194 NLRB 192, 193 (pro-union employee came down with "'bad case of the shingles'" causing her to quit, due to employer's exaggerated surveillance of her work, threats, and harassment during a union organizational campaign).

preemption doctrine. *Linn* sustained the power of a state court to award damages for malicious defamation occurring in a labor dispute; *Russell* sustained its power to award damages for violence occurring in a labor dispute.

While the opinions in those cases noted that the conduct involved would constitute a common law tort even if it did not occur in a labor dispute context and that, to the extent that the Board could provide a remedy, it was not as full as a court could provide (see 356 U.S. at 642-646; 383 U.S. at 61-64), this Court's subsequent opinion in *Lockridge, supra*, makes plain that these factors were not the reason for excepting those cases from the *Garmon* doctrine. Rather, the exception rested on the ground that, "in spite of the force of the policies *Garmon* seeks to promote," the Court could not conscientiously presume "that Congress meant to intrude so deeply into areas traditionally left to local law." *Lockridge, supra*, 403 U.S. at 297. See also *Lodge 76, Machinists v. Wisconsin Employment Relations Commission, supra*, slip op. 4-5, and notes 2 and 3, explaining *Russell* and *Linn* on similar grounds.

Moreover, the Court in *Linn* drew a distinction between a defamatory statement "issued with knowledge of its falsity, or with reckless disregard of whether it was true or false" (383 U.S. at 61), and one lacking this degree of malice. It found that the exercise of state jurisdiction over the former "would be a 'merely peripheral concern of the Labor Management Relations Act'" (*ibid.*), but that the exercise of such jurisdiction over the latter would create a danger of inhibiting the robust and wide open debate that the Act



encourages (*id.* at 62). Accordingly, it confined the power of the state to redress defamation occurring in a labor dispute to the former class of statements.<sup>41</sup> Cf. *New York Times Co. v. Sullivan*, 376 U.S. 254.

The tort of intentional infliction of emotional distress by outrageous conduct (Pet. Br. 58) is a relatively new cause of action whose roots in state law are not as deep as are those of torts based on violence or defamation. See Prosser, *Law of Torts* 49-50, 56 (4th ed.). Moreover, when, as in this case, the allegedly outrageous conduct sought to be redressed is directly related to allegations of employment discrimination that the Act pervasively regulates, a state remedy for the former is not "peripheral" to, but imperils, the federal regulatory scheme.

The potential for impairing the federal regulatory scheme is not lessened by the fact that the state would be applying general tort law rather than labor law and would be providing a remedy—damages for emotional and physical distress—that the Board could not provide. As the Court stated in *Garmon, supra*, 359 U.S. at 244:

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<sup>41</sup> In *Linn*, the Court also recognized that, "in view of the propensity of juries to award excessive damages for defamation, the availability of libel actions may pose a threat to the stability of labor unions and smaller employers." 383 U.S. at 64. Accordingly, it further held that "the amount of damages which may be recovered depends upon evidence as to the severity of the resulting harm. \* \* \* [A] complainant may not recover except upon proof of such harm. \* \* \* If the amount of damages awarded is excessive, it is the duty of the trial judge to require a remittitur or a new trial. Likewise, the defamed party must establish that he has suffered some sort of compensable harm as a prerequisite to the recovery of additional punitive damages." *Id.* at 65-66.

Nor has it mattered whether the States have acted through laws of broad general application rather than laws specifically directed towards the governance of industrial relations [footnote omitted]. Regardless of the mode adopted, to allow the States to control conduct which is the subject of national regulation would create potential frustration of national purposes.<sup>42</sup>

The Court added (*id.* at 246-247):

Nor is it significant that California asserted its power to give damages rather than to enjoin what the Board may restrain though it could not compensate. \* \* \* [Since] remedies form an ingredient of any integrated scheme of regulation, to allow the State to grant a remedy here which has been withheld from the National Labor Relations Board only accentuates the danger of conflict.

2. On no firmer footing is petitioner's attempt (Br. 63-83) to fit this case within the other exception for matters of only "peripheral concern" to the NLRA. In *Machinists v. Gonzales*, 356 U.S. 617, this Court sustained the power of a state court to entertain a suit by a union member claiming he had been expelled from the union in violation of rights conferred by the union's constitution and bylaws and to order, as well as his reinstatement in the union, damages for wages lost due to

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<sup>42</sup> On at least three other occasions, the Court has likewise concluded that, where a state seeks to regulate conduct central to the NLRA's concern, it is irrelevant that it may be applying law not directly related to the regulation of labor relations. See *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 479-481; *Plumbers' Union v. Borden*, 373 U.S. 690, 698; *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 292.



the revocation of membership. However, *Gonzales* was distinguished in *Plumbers' Union v. Borden*, 373 U.S. 690, and *Iron Workers Union v. Perko*, 373 U.S. 701, and that distinction, which was adhered to in *Lockridge*, *supra*, is apposite here.

In *Borden*, a union member was refused a job referral by the union because he had sought work directly instead of through the union hiring hall. He brought a state court suit against the union claiming, *inter alia*, that it "had breached a promise, implicit in the membership arrangement, not to discriminate unfairly or to deny any member the right to work." 373 U.S. at 692. The jury awarded, in addition to actual loss of earnings (\$1,916), compensation for mental suffering (\$1,500) and punitive damages (\$5,000). The trial court disallowed recovery for mental anguish and reduced the punitive damages to the amount of the actual damages, thus awarding total damages of \$3,832. *Id.* at 693. This Court found that, if it were assumed that the union's "refusal and the resulting inability to obtain employment were in some way based on [Borden's] actual or believed failure to comply with internal union rules," it was "certainly 'arguable'" that the union's conduct violated Sections 8(b)(1)(A) and 8(b)(2) of the NLRA. On the other hand, "the Board might have found that the union conduct in question was not an unfair labor practice but rather was protected concerted activity within the meaning of § 7," because "the refusal to refer was due only to [Borden's] efforts to circumvent a lawful hiring-hall arrangement \* \* \*." *Id.* at 694-695 (emphasis omitted). Thus, unlike the suit in *Gonzales*—which "was focused on purely inter-

nal union matters, *i.e.*, on relations between the individual plaintiff and the union not having to do directly with matters of employment, and [where] the principal relief sought was restoration of union membership rights"—the "'crux' of the action [in *Borden*] concerned Borden's employment relations and involved conduct arguably subject to the Board's jurisdiction." *Id.* at 697. Accordingly, the Court held that the state court suit was barred under *Garmon*.

Similarly, the Court held in *Perko* that *Garmon* barred a state court suit that had been brought by a union member claiming that the union had wrongfully deprived him of his right to continue working as a foreman and had thereby caused his discharge. 373 U.S. at 702-704. The Court found that, "[a]s in *Borden*, the crux of the action here concerned alleged interference with the plaintiff's existing or prospective employment relations and was not directed to internal union matters." *Id.* at 705. Accordingly, it set aside an award of \$25,000 damages for past and future loss of earnings. *Id.* at 704.

Finally, in *Lockridge*, the Court held that *Garmon* barred a state court suit by an employee alleging that the union had wrongfully declared him delinquent in his union dues obligation and then caused his discharge under the union security agreement with the employer (see n. 8, *supra*). In so holding, the Court again emphasized that *Gonzales* "'was focused on purely internal union matters,' \* \* \* a subject the National Labor Relations Act leaves principally to other processes of law." 403 U.S. at 296. The Court added (*ibid.*):

To assess the legality of his union's conduct toward Gonzales the California courts needed only to focus upon the union's constitution and by-laws. Here, however, Lockridge's entire case turned upon the construction of the applicable union security clause, a matter as to which \* \* \* federal concern is pervasive and its regulation complex. The reasons for Gonzales' deprivation of union membership had nothing to do with matters of employment, while Lockridge's cause of action and claim for damages was based solely upon the procurement of his discharge from employment.

As the court below correctly found (*supra*, pp. 7-8), the instant case is like *Borden*, *Perko*, and *Lockridge*, and not like *Gonzales*, for the crux of Hill's complaint is job discrimination and not internal union affairs. Petitioner's arguments to the contrary do not withstand analysis.

First, petitioner asserts that "the conduct in *Borden*, *Perko* and *Lockridge* raised issues which might be regarded as particularly within the expertise of the Labor Board and there existed \* \* \* a risk of inconsistency between judicial resolution of the issues and the Board's resolution" (Br. 69). On the other hand, according to petitioner, this case, like *Gonzales*, involves activity which, "to the extent [it was] not clearly outside the Act, \* \* \* was either clearly prohibited \* \* \* or arguably prohibited \* \* \* [but] not by any stretch of the imagination protected" (Br. 70). As we have already shown (*supra*, pp. 16-24, 28-29), however, the latter assertion misconceives both the scope of the Act and the gravamen of the instant action.

Second, petitioner contends that "the interference with existing or prospective employment relations in *Borden*, *Perko* and *Lockridge* was far more direct and immediate than in either *Gonzales* or this case" (Br. 71). This contention, too, rests on a premise that we have shown to be invalid (*supra*, pp. 30-33)—i.e., that Congress was concerned in the NLRA with single acts of job discrimination but not with a continuing course of such discrimination.

Third, petitioner contends that "in *Borden*, *Perko* and *Lockridge* the damages awarded were for lost earnings alone, a form of relief the Board could have given, while in *Gonzales* the damages award \* \* \* included as well a sum for mental suffering, which was clearly beyond the Board's power" (Br. 72). Here, petitioner says, the "compensatory damages awarded \* \* \* included no sum for lost earnings and consisted entirely of damages for severe emotional distress, which could not have been obtained from the Board" (*ibid.*). However, in *Borden*, *Perko*, and *Lockridge*, the relief granted by the state court was not limited to relief that the Board could have awarded.<sup>43</sup> Moreover, as shown above (pp. 15, 39), the fact that the complaint here sought damages that the Board cannot provide—with respect to conduct that is central, and not merely pe-

<sup>43</sup> In *Borden*, the court awarded punitive damages in addition to damages for actual loss of earnings. In *Perko*, it awarded damages for prospective, as well as actual, loss of earnings. (*Supra*, pp. 40-41.) In *Lockridge*, the trial court awarded the employee \$32,678.56 as compensation for wages actually lost and also restored him to membership in the union, although he never sought such a remedy. On appeal, the State Supreme Court affirmed but also ordered restoration of the employee's seniority rights. 403 U.S. at 282.



ripheral, to the concerns of the NLRA—heightens, rather than lessens, the need for precluding such relief.

3. Finally, contrary to petitioner's contention (Br. 84-111), a finding of preemption here is not undermined by the fact that the courts are empowered to adjudicate union-member disputes under Title I of the Labor Management Reporting and Disclosure Act of 1959 (see, e.g., 29 U.S.C. 413), to entertain suits alleging breach of the duty of fair representation, and to determine, under Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. 185, questions of breach of the collective bargaining agreement, even if the conduct involved may also constitute an unfair labor practice under the NLRA. "Unlike the problem here under review, Congress did not put enforcement of the Labor-Management Reporting and Disclosure Act of 1959 into the hands of the Board. \* \* \* And it affirmatively expressed an intention that the Board not possess preemptive jurisdiction over suits to enforce collective bargaining agreements." *Lockridge, supra*, 403 U.S. at 289, n. 5. In actions alleging breach of the duty of fair representation, the rule of law applied "is so structured and administered that \* \* \* it is safe to presume that judicial supervision will not disserve the interests promoted by the federal labor statutes \* \* \*." *Id.* at 297. See also *Vaca v. Sipes*, 386 U.S. 171, 181-182.<sup>44</sup>

<sup>44</sup> The trial court here sustained a demurrer to the two counts of the complaint whose terms arguably could be viewed as encompassing a claim that the collective bargaining agreement or the duty of fair representation was breached (see counts 3 and 4 set out in n. 2, *supra*). Petitioner nonetheless contends that the surviving cause of action (count 2) may "suffice to state a claim \* \* \* for breach by a union of its duty of fair representation, or

Moreover, all of these actions are based on federal law, whereas the instant action is based on state law. Allowing different forums to apply and rationalize a body of federal law does not present the same danger of disparate substantive standards that would result from concurrent application of state and federal law. As the Court stated in *Connell Construction Co. v. Plumbers and Steamfitters Local Union No. 100*, 421 U.S. 616, 635-637—which upheld the application of federal anti-trust laws to activity also regulated by the NLRA, while refusing to permit the application of state anti-trust laws—the federal laws were "carefully tailored" by Congress and the Court in terms of both substance and remedy to avoid conflict with federal labor policy, while the state laws "generally have not been subjected to this process of accommodation." *Id.* at 636.

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for a union's imposition of discipline upon a member in violation of the procedural and substantive standards set forth in the Labor Management Reporting and Disclosure Act" (Br. 84). Count 2 alleged in essence that the Union threatened to deny job opportunities to Hill because of his lack of good standing with the Union leadership (a classic form of discrimination proscribed by Section 8(b) (2) of the NLRA), and Hill's proof at the trial was directed to establishing such discrimination. Moreover, the cause of action under count 2 was predicated solely on state tort law; a cause of action under the LMRDA or for breach of the duty of fair representation is based on federal law. That Hill might have been able to allege and prove a cause of action under federal law (see Br. 85) does not help petitioner's position here. A fundamental purpose of the *Garmon* doctrine—to afford the lower courts "a rule capable of relatively easy application" (*supra*, p. 15)—would be defeated if the preemption determination turned on what could have been alleged and proven, instead of what actually was done. Whether the present suit is preempted by the NLRA is determined by what petitioner alleged and actually proved under count 2 of the complaint, the only count that survived demurrer in the trial court.



**F. Even If The *Garmon* Doctrine Were Modified So As Not To Apply To "Union-Member Relations," The Present Action Should Still Be Preempted**

In *Lockridge, supra*, the dissenting Justices expressed the view that the *Garmon* preemption doctrine should not be applied to "union-member relations," which involve "the affairs between the union and the employee as union member." 403 U.S. at 320 (Mr. Justice White); see also *id.* at 305, 308-309 (Mr. Justice Douglas).<sup>45</sup> They argued that Congress did not intend to deal comprehensively with union-member relations, and that it preserved state remedies for some of the conduct prohibited by federal law. *Id.* at 323 (Mr. Justice White). Moreover, they stated, existing Board remedies are inadequate to provide full relief to those injured in such controversies.

Whatever the merit of relaxing the *Garmon* preemption doctrine with respect to union-member disputes

<sup>45</sup> Mr. Justice White's dissenting opinion also urged that the *Garmon* rule should be revised so that preemption would no longer follow merely from a determination that conduct is "arguably protected under § 7" of the NLRA. With activity that is "arguably prohibited by § 8 the charging party can at least present the General Counsel with the facts, and if the General Counsel issues a complaint, the charging party can present the Board with the facts and arguments to support the claim. But for activity that is arguably protected, there is no provision for an authoritative decision by the Board in the first instance \* \* \*." 403 U.S. at 325-326.

There is no need to resolve that question here, for, as in *Lockridge*, "[t]his is not a situation where the sole argument for preemption is that the union's conduct was arguably protected. Clearly, if the facts are as [petitioner] believes them to be, there is ample reason to conclude that [respondents] probably committed an unfair labor practice." 403 U.S. at 290, n. 6. Indeed, the Board so found on the charge submitted to it for adjudication (see *supra*, p. 5).

generally, the considerations that prompted and support that doctrine warrant its continued application where, as here, the union-member dispute is not "focused on purely internal union matters" but has to do "directly with matters of employment." *Borden, supra*, 373 U.S. at 697.<sup>46</sup>

Employment discrimination based on considerations of union membership or compliance with union policies, and the use of union hiring halls to effect such discrimination, are matters with which Congress dealt directly and comprehensively in the NLRA (see *supra*, pp. 19-23). Congress did not intend to outlaw hiring halls as such or to foreclose the use of referral preferences based on legitimate objective criteria (see *supra*, pp. 23-24). To permit a state court to "regulate conduct so plainly within the central aim of federal regulation" (*Garmon, supra*, 359 U.S. at 244) presents a real danger of the

<sup>46</sup> Although Professor Cox contends that the *Garmon* preemption doctrine should not be applied to preclude the courts from awarding damages "for loss of employment following wrongful expulsion from membership" (and he views *Lockridge*, no less than *Gonzales*, as falling in this category), Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1374, 1375 (1972), he adds that this would not undermine cases like *Borden* and *Perko*:

In these cases the employee was complaining only of the deprivation of a job; no union expulsion had occurred. The NLRB could deal with the whole controversy just as in any other case of discrimination encouraging or discouraging union membership. \* \* \* In addition, a line drawn between claims of wrongful interference with employment and wrongful expulsion lends itself to relative ease and uniformity of administration. [*Id.* at 1376, n. 174.]

As shown (*supra*, pp. 40-43), the present case is like *Borden* and *Perko*.

very conflicts that the preemption doctrine was designed to avoid.<sup>47</sup>

In sum, the Court adopted the *Garmon* approach for determining whether activity was preempted by the NLRA because “experience—not pure logic— \* \* \* taught” that each of the alternative approaches “sacrificed important federal interests in a uniform law of labor relations centrally administered by an expert agency without yielding anything in return by way of predictability or ease of judicial application.” *Lockridge, supra*, 403 U.S. at 291. In *Lockridge*, the Court recently reexamined the *Garmon* doctrine, and, still finding no better alternative, decided to adhere to it. See also *Lodge 76, supra*, slip op. 6-7. Nothing has occurred that would warrant a change at this time—especially in light of the fact that the *Garmon* preemption doctrine is a matter of statutory, not constitutional,

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<sup>47</sup> Petitioner urges the adoption of a new preemption formula based on *Teamsters Local 20 v. Morton*, 377 U.S. 252, which would permit state jurisdiction when the activity is not actually protected by the NLRA and the state law applied is not based “upon an accommodation of the special interests of employers, unions, employees and the public in the process of employee self-organization and collective bargaining” (Br. 121). A formula of that sort might have validity when the activity is either protected by Section 7 of the NLRA or unregulated by the Act, for there would be no easy means of obtaining a Board determination of the Section 7 question (see n. 45, *supra*). Here, however, the Union’s conduct was either prohibited by Section 8 or protected by Section 7, and Hill could readily have obtained a Board determination by simply filing an unfair labor practice charge (as he did with respect to one incident).

interpretation, which Congress is free to overrule or modify by amending the NLRA.<sup>48</sup> As shown above, the *Garmon* doctrine leads to a finding of preemption here.<sup>49</sup>

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<sup>48</sup> It is, accordingly, significant that, although the decisions of this Court giving the NLRA broad preemptive effect were well known at the time of the 1959 Landrum-Griffin (73 Stat. 519), and the 1974 Hospital (88 Stat. 397), amendments to the Act, Congress has altered the preemption doctrine in only one respect. See Section 14(c)(2) of the NLRA, 29 U.S.C. 164(c)(2), added in 1959, which overruled the holding in *Guss v. Utah Board*, 353 U.S. 1, that state regulation was precluded even where the National Labor Relations Board would not exercise its jurisdiction over the labor dispute involved. Cf. H.R. 3, 86th Cong., 1st Sess., which would have precluded giving preemptive effect to Acts of Congress unless the Acts expressly so provided or state law was in direct conflict; the bill passed the House (105 Cong. Rec. 11808) but lapsed in the Senate. See 105 Cong. Rec. 11648, 11655 (House debate) and 105 Cong. Rec. 235 (remarks of Senator McClellan) (indicating congressional awareness of this Court’s preemption decisions under the NLRA).

<sup>49</sup> Indeed, the activity involved in the instant case furnishes a stronger basis for preemption than the activity involved in *Lockridge*. In *Lockridge*, the state court was called upon to interpret a union’s constitution in order to assess the lawfulness of the union’s treatment of an employee-member. Although that exercise of state court jurisdiction was preempted because the discrimination involved the employment relationship, interpretation of a union’s constitution is within a state court’s institutional capacity. Here, by contrast, the state court and jury were asked to judge the lawfulness of the operation of the union’s hiring hall, a task which, as shown, *supra*, pp. 19-26, Congress has committed to the Board’s expertise.

## CONCLUSION

The judgment of the California Court of Appeal should be affirmed.

Respectfully submitted.

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## APPENDIX

The cases listed below involve complaints of violations of the National Labor Relations Act in connection with union control over hiring or employment practices. Cases preceded by an asterisk involve allegations of discrimination in retaliation for dissident union activity or because of hostility on the part of union officials. Cases preceded by double asterisks involve allegations of more than a single instance of discrimination.

*Boilermakers and its Local 92 (American Pipe and Steel Co.),* 93 NLRB 54.  
*Chain Service Restaurant Employees Local 42 (Childs Co.),* 93 NLRB 281, enforced as modified, 195 F. 2d 617 (C.A. 2).  
*Retail Clerks Local 770 (Hollywood Ranch Market),* 93 NLRB 1147.  
*Boilermakers Local 6 (Consolidated Western Steel Corp.),* 94 NLRB 1590.  
*Longshoremen's Association Local 1291 (Jarka Corp.),* 94 NLRB 320, enforced as modified, 198 F. 2d 618 (C.A. 3).  
\**Longshoremen's and Warehousemen's Union and its Local 10 (Pacific Maritime Association),* 94 NLRB 1091, enforced, 210 F. 2d 581 (C.A. 9).  
*Carpenters Local 1498 and 184 (Utah Construction Co.),* 95 NLRB 196.  
*Operating Engineers Local 57 (Gamino Construction Co.),* 97 NLRB 386, enforced, 201 F. 2d 771 (C.A. 1).  
*American Radio Association (Alaska Steamship Co.),* 98 NLRB 22, enforced as modified, 211 F. 2d 357 (C.A. 9).  
*Longshoremen's and Warehousemen's Union and its Local 19 (Waterfront Employers of Washington),* 98 NLRB 284, enforced, 211 F. 2d 946 (C.A. 9).  
\**Marine Cooks and Stewards (Pacific American Ship-Owners Assoc.),* 98 NLRB 582.  
*Teamsters Local 621 (Sesco Contractors),* 98 NLRB 824.



*Newspaper and Mail Deliverers' Union (New York Times Co.)*, 101 NLRB 589.

*Operative Plasterers Local 867 (Morrison-Knudson Co.)*, 101 NLRB 123.

*Heat and Frost Insulators Local 28 (Construction Specialties Co.)*, 102 NLRB 1542, enforced, 208 F. 2d 170 (C.A. 10).

*Longshoremen's and Warehousemen's Union Local 10 (Pacific Maritime Association)*, 102 NLRB 907, enforced, 214 F.2d 778 (C.A. 9).

\**Longshoremen's Association, District Councils and Locals (Puerto Rico S.S. Assoc.)*, 103 NLRB 1217, enforced, 211 F. 2d 274 (C.A. 1).

*Operative Plasterers' Local 797 (Haddock Engineers Ltd.)*, 104 NLRB 994, enforced as modified, 215 F. 2d 734 (C.A. 9).

*Boilermakers Local 13 (Babcock and Wilcox Co.)*, 105 NLRB 339.

\**Boilermakers and its District Lodge 57, Locals 363, 679 (Ebasco Services, Inc.)*, 107 NLRB 617.

*Pacific Coast Marine Firemen*, 107 NLRB 593.

*Carpenters Local 472 and Machinists Union (McGraw Construction Co.)*, 107 NLRB 1043.

*Iron Workers Local 595 (Bechtel Corp.)*, 108 NLRB 1070, enforced, 218 F. 2d 958 (C.A. 6).

*Machinists Association, et al. (Seabright Construction Co.)*, 108 NLRB 8.

*Carpenters Local 1281 (J. C. Boespflug Co.)*, 109 NLRB 874.

*Carpenters Mohawk District Council, et al. (Grow Construction Co.)*, 109 NLRB 522, enforced, 222 F. 2d 542 (C.A. 2).

*Electrical Workers Local 1533 (Golden Valley Electric Association, Inc.)*, 109 NLRB 397.

*Iron Workers Local 595 (R. Clinton Construction Co.)*, 109 NLRB 73.

*Carpenters Local 1423 (Columbus Showcase Co.)*, 111 NLRB 206, enforced, 238 F. 2d 832 (C.A. 5).

*Carpenters Local 1028 (Dennehy Construction Co.)*, 111 NLRB 1025, enforced, 232 F. 2d 454 (C.A. 10).

*Electrical Workers Local 948 (Hall Electric Co.)*, 111 NLRB 68.

\**Hod Carriers' Local 264 (Jones-Hettelsater Construction Co.)*, 112 NLRB 1482.

*Operating Engineers Local 12 (AGC, Southern Calif. Chapter)*, 113 NLRB 655, enforced as modified, 237 F. 2d 670 (C.A. 9).

*Hod Carriers Local 369 (Frommeyer and Co.)*, 114 NLRB 872, enforced as modified, 240 F. 2d 539 (C.A. 3).

\**Iron Workers Local 36 (H. E. Stoudt and Son, Inc.)*, 114 NLRB 838.

*Millwright Local 2484 (W.S. Bellows Construction Corp.)*, 114 NLRB 541.

*Teamsters Local 148 (Harry Griffin Trucking Co.)*, 114 NLRB 1494.

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*Operating Engineers Locals 18, 18-A, and 18-B (Hatcher Bros., Inc.)*, 116 NLRB 1145.

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*Operating Engineers Local 542 (Frommeyer & Co.)*, 117 NLRB 1863, enforced, 255 F. 2d 703 (C.A. 3).

*Meat Cutters Local 88 (A and P)*, 117 NLRB 1542.

*Heat & Frost Insulators and its Local 47 (Alexander-Stafford Corp.)*, 118 NLRB 79, enforced, 254 F. 2d 955 (C.A.D.C.).

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*Local 490, Int'l Hod Carriers*, 130 NLRB 380, enforced, 300 F. 2d 328 (C.A. 8).

\*\**Local 1486, Bro. of Painters*, 132 NLRB 803, 818-826.

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 \**Local 69, Plumbing & Pipe Fitting Workers*, 136 NLRB 1556.  
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*Local 507, Int'l Hod Carriers etc.*, 140 NLRB 1090, enforced, 336 F. 2d 460 (C.A. 9).  
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 \**Local Union No. 181, Int'l U. Op. Engineers*, 148 NLRB 750.  
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 \*National Maritime Union, 177 NLRB 615, enforced, 423 F. 2d 625 (C.A. 2).  
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 \*Rust Engineering Co., 183 NLRB 649.

\*Laborers, Local 1177 (Nichols Const. Corp.), 183 NLRB 1063.  
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 \*Local Un. 456, Electrical Workers, 183 NLRB 1277.  
 Asbestos Workers' Local 40 (Robert A. Keasbey Co.), 184 NLRB 708, enforced, 451 F. 2d 119 (C.A. 2).  
 Plumbers, Local 60 (Specialty Contractors), 184 NLRB 732, enforced, 79 LRRM 2127 (C.A. 5).  
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 Asbestos Wkrs. Local 53 (McCarty & Armstrong), 185 NLRB 642.  
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*Local 851, ILS (John H. Biggers),* 194 NLRB 1027.

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*Sheet Metal Workers', Local 361 (Langston & Co., Inc.),* 195 NLRB 355, enforced, 477 F. 2d 675 (C.A. 5).

*Local 481, Electrical Workers (Amick Electric Co.),* 196 NLRB 104.

*Chicago Local No. 245, Lithographers and Photoengravers International Union (Alden Press),* 196 NLRB 720, enforced, 83 LRRM 2957 (C.A. 7).

*International Longshoremen's Assn. Local 1581,* 196 NLRB 1186, enforced, 489 F. 2d 635 (C.A. 5).

*Ironworkers, Local 10 (Guy F. Atkinson Co.),* 196 NLRB 712, enforced, 83 LRRM 2409 (C.A. 8).

*Laborers' Local 573 (F.F. Mengel Construction Co.),* 196 NLRB 440, enforced, 83 LRRM 2988 (C.A. 7).

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- \*\**Operating Engineers, Local 18 (C.F. Braun Co.)*, 205 NLRB 901, enforced, 500 F. 2d 48 (C.A. 6).
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No. 75-804

Supreme Court, U. S.  
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**Supreme Court of the United States**

October Term, 1976

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JOY A. FARMER, SPECIAL ADMINISTRATOR OF  
ESTATE OF RICHARD T. HILL,

*Petitioner,*

v.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS  
OF AMERICA, LOCAL 25, *et al.*,

*Respondents.*

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On Writ of Certiorari to the California Court  
of Appeals, Second Appellate District

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**BRIEF FOR THE  
AMERICAN FEDERATION OF LABOR AND  
CONGRESS OF INDUSTRIAL ORGANIZATIONS  
AS AMICUS CURIAE**

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**Supreme Court of the United States**

**October Term, 1976**

**No. 75-804**

JOY A. FARMER, SPECIAL ADMINISTRATOR OF  
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UNITED BROTHERHOOD OF CARPENTERS AND JOINERS  
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**On Writ of Certiorari to the California Court  
of Appeals, Second Appellate District**

**BRIEF FOR THE  
AMERICAN FEDERATION OF LABOR AND  
CONGRESS OF INDUSTRIAL ORGANIZATIONS  
AS AMICUS CURIAE**

This brief *amicus curiae* is filed on behalf of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 111 national and international unions having a total membership of approximately 14,000,000 men and women, with the consent of the parties as provided for in Rule 42(2) of this Court's Rules.

**INTRODUCTION AND SUMMARY OF ARGUMENT**

As respondents show in their brief, the present case is a simple one under this Court's precedents. At the heart of petitioner's California's tort law claim was the allegation that he had been denied dispatch from the union's hiring hall because of his opposition to the union business agent and the business agent's policies. Such conduct, if established, is a violation of §§ 8(b)(2) and 8(b)(1)(A) of the National Labor Relations Act, as amended (hereafter the "NLRA"), remediable by the National Labor Relations Board (hereafter the "NLRB"). In fact, petitioner did successfully charge the unions with a violation of § 8(b)(2) with respect to the failure to dispatch him to a particular job.



This Court has held, without deviation since *San Diego Unions v. Garmon*, 359 U.S. 236, where this was the precise issue for decision, that a state is without power to award damages under its tort law based on non-violent conduct which is an unfair labor practice under the NLRA. And, as the Court of Appeal correctly understood, *Plumbers' Union v. Borden*, 373 U.S. 690, is a precedent which squarely forecloses state jurisdiction in this case. Moreover, as respondents also point out, petitioner's attempt to recover under state tort law punitive and other damages which the NLRB is not empowered to award for conduct which the Board has already remedied, conflicts with the remedial scheme of the NLRA and is therefore impermissible not only under *Garmon* but under *Teamsters Union v. Morton*, 377 U.S. 252.

Thus, if petitioner had contented himself with attempting to distinguish these precedents, there would be no occasion for a brief *amicus curiae*, for that effort cannot possibly succeed. But he urges also a radical overhaul of the *Garmon* doctrine. While petitioner invokes criticisms of *Garmon* within the Court in support of this attack, the authority cited does not call for the total retreat from *Garmon* necessary to aid petitioner here. For his claim fits into neither of the categories which concerned Mr. Justice White in his dissenting opinion in *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 309.

This case is plainly not one where the aggrieved party is precluded from obtaining a hearing by the Board. (See *id.* at 325-332.)<sup>1</sup>

<sup>1</sup> We agree with the suggestion in Mr. Justice White's dissent (*id.* at 328, n. 6) that the Board should establish a procedure pur-

Nor is this a case where the jury awarded "relief for union deprivation of members' state law rights under the union constitution and bylaws." (*Id.* at 309.) Rather, as the case went to the jury the claim was "primarily job related" and thus within the "unmistakable focus of both the NLRA and the LMRA [, which] is on labor-management relations, rather than union-member relations, as such". (*Id.* at 320.)

It is not even arguable here, as it was in *Lockridge*, that the plaintiff's loss of employment opportunities was the consequence of an expulsion or suspension or any other union action that diminished plaintiff's membership status. For, in this case, plaintiff's membership status was entirely unaffected by the union's conduct. And, as this case was tried, it, in contrast to *Machinists v. Gonzales*, 356 U.S. 617, and arguably *Lockridge* (403 U.S. at 324), was not based on

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suant to 5 U.S.C. § 1554(e) whereby parties who are not in a position to file an unfair labor practice charge may obtain a declaratory order from the Board as to whether particular conduct is within §§ 7 or 8 of the Act and therefore under *Garmon* not regulable by the States. (The Board might also determine that the activity is designedly unregulated, which would also oust State jurisdiction. *Machinists Union v. Wisc. Emp. Rel. Bd.*, ..... U.S. ...., 44 U.S.L.W. 5026.) Such an order resolving doubtful issues of subject matter jurisdiction would be wholly analogous to the Board's present procedure (created in response to the enactment of § 14(c)), advising the parties whether a dispute sufficiently affects commerce to warrant the exercise of Board jurisdiction. In both situations the declaratory order eliminates the risk that neither the state nor the Board will act (the equivalent of the result in *Guss v. Utah Board*, 353 U.S. 1), or that the State will enter the federal domain (contrary to *Garmon*). And, for the reasons stated in *Garmon* (359 U.S. at 244-245) such a procedure serves the paramount interest of assuring that it is the Board which in the first instance makes the jurisdictional determination where that turns on an interpretation of §§ 7 and 8.

an alleged breach of the union constitution.

In short, petitioner's claim cannot be distinguished in any way from that of a non-member who alleges discrimination in a union hiring hall against him in job referrals, an allegation which is plainly beyond the states' competence. Thus, there is no occasion here to reconsider even *Lockridge*, much less *Borden* and its companion *Iron Workers v. Perko*, 373 U.S. 701, which hold that where union conduct against both membership rights and job rights *does* create a problem of characterization the court must look to "the crux of the action" (373 U.S. at 697 and 705, following *Gonzales*, 356 U.S. at 618) in determining whether it is subject to the exclusive jurisdiction of the NLRB.

It is noteworthy that while Prof. Cox, on whom petitioner relies heavily in this connection (Pet. Br. 115-117), believes *Gonzales* and *Lockridge* to be irreconcilable, and prefers *Gonzales*, Prof. Cox also agrees with the result in *Borden* and *Perko*. Petitioner's attempt to explain away Prof. Cox's approval ("since those cases involved only lost earnings which the Board had the power to award" (Pet. Br. 117)), misstates both the facts of those cases<sup>2</sup> and Prof. Cox's actual reasoning.<sup>3</sup> The *Lockridge* dissenting opinions like-

<sup>2</sup> In *Borden* the state court had awarded punitive damages (373 U.S. at 693). In *Perko* the plaintiff had claimed, and apparently recovered, damages for both "past and future loss of earnings" (*id.* at 703). Under § 10(c) of the Act the employee is thought to be "made whole" by "reinstatement" and "back pay" — past earnings. (See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419, citing *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177, 197, and other NLRB cases.)

<sup>3</sup> Prof. Cox wrote:

"In these cases the employee was complaining only of the deprivation of a job; no union expulsion had occurred. The

wise do not disagree with *Borden* or *Perko*; indeed, Justice Douglas' dissent expressly accepts those precedents. (See 403 U.S. 302 at 308).

Indeed, while petitioner quotes Prof. Cox's analysis *in extenso*, he fails to identify Prof. Cox's conclusion, which is only that "it seems best to allow state and federal courts to award damages for procuring an employee's discharge in an action based upon wrongful expulsion from membership" (85 Harv. L. Rev. at 1374, emphasis added), and which therefore does not support the result petitioner seeks.

In more normal circumstances we would not be inclined to burden the Court with further argument. However, in light of the broad implication of petitioner's argument concerning the preemption doctrine, we believe it appropriate

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NLRB could deal with the whole controversy just as in any other case of discrimination encouraging or discouraging union membership. While the facts of these two cases suggest that injustice to the individuals rather than the public interest in self-organization of labor-management relations was at stake, the NLRB's capacity to deal with the whole controversy obviates most of the advantages of allowing state tribunals to grant relief for the losses attendant upon discharge following wrongful expulsion. In addition, a line drawn between claims of wrongful interference with employment and wrongful expulsion lends itself to relative ease and uniformity of administration." (Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1376.)

We submit, with respect, that a more fundamental reason for drawing the line at this point is because that is where Congress drew it by giving the Board special competence over interference with employment rights based on union membership while leaving improper interference with membership rights to State law and the federal judicial remedy provided by the LMRDA. (See pp. 31-41, *infra*.) In any event, nothing herein turns on this difference.



to develop two further points. First, we show that Congress ratified the *Garmon* rule in 1959 when it considered and enacted amendments to the NLRA. Second, we demonstrate that the regulation of employment discrimination based on union activity is as plainly a central concern of the NLRA as the regulation of the collective bargaining process and its integral component the use of economic weapons affirmed to be beyond the competence of the states last term in *Machinists Union v. Wisc. Emp. Rel. Bd.*, *supra*, 44 U.S.L.W. 5026.

## ARGUMENT

### I

In 1959 Congress dealt directly with the problem of state jurisdiction over labor-management controversies within the commerce power. Congress was entirely familiar with this Court's decisions, particularly *Garner v. Teamsters Union*, 346 U.S. 485, and *Guss v. Utah Board*, 353 U.S. 1; *Garmon* itself was decided while the bill was being debated in the Senate and before the House considered the question at all. The focus of the debate, and of the legislation, was the problem of the "no-man's land" created by the *Guss* decision, which held, primarily on the basis of the cession proviso to § 10(a) enacted in 1947, that even where the NLRB had declined to exercise its statutory jurisdiction, the states were without authority to act. (See 353 U.S. at 5-10.) The result was that no remedy whatsoever was available.

Despite broad consensus that this "no-man's land" should be eliminated, there was considerable disagreement as to the proper solution. Yet, as we shall show, the partisans of the respective viewpoints shared an understanding that the *Garner-Garmon* principle should govern disputes

over which the Board had not relinquished jurisdiction; indeed, that principle informed the respective positions which they took as well as the compromise which ultimately became law. We begin with an overview of the evolution of the legislation which ultimately was adopted to deal with this problem.

A. S. 505, the Kennedy-Ervin bill, which was referred to the Senate Committee on Labor and Public Welfare, would have required the NLRB to assert jurisdiction over all disputes arising under the Act, but provided that the Board could by agreement with any agency of any state or territory, cede jurisdiction (with certain exceptions) unless the state law was inconsistent with the corresponding provisions of the NLRA. (S. 505, § 601, I Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (hereafter "1959 Leg. Hist."), p. 75.) The bill which the Committee reported to the full Senate (S. 1555) was considerably more complex. It would have required the Labor Board to exercise its jurisdiction to the full extent permitted by the Commerce Clause, but would have authorized the Board to enter into agreements with state agencies "whereby such agency is designated as an agency of the Board." Not only would the state agencies have been required to apply federal law, but the bill provided that the decision of a state agency not to proceed would be appealable to the NLRB just as an appeal from the refusal of a regional office of the NLRB to proceed, its orders would be enforced by the NLRB, and temporary relief could be sought by a state agency only with the NLRB's prior approval. (See S. 1555, § 601, I 1959 Leg. Hist., pp. 391-393.)

This provision was opposed by a minority in the Senate



Labor Committee who proposed to allow the states to assume jurisdiction over disputes over which the Labor Board has declined jurisdiction. That proposal was embodied in § 502 of S. 748 (*id.*, p. 141), the Administration bill sponsored by Sens. Goldwater, Dirksen, Allott and others, and in S. 1386, a bill introduced by Sen. McClellan (*id.*, pp. 332-334).

The proponents of the Administration bill challenged the Committee bill as impractical and unrealistic because only a small minority of the states had agencies which would qualify to assume jurisdiction under the terms stated in that bill, and because they believed that no state would adopt legislation to create agencies which would be subordinate to the National Board. They thus doubted whether the Committee bill was any solution at all. They did not question the principle of national uniformity as such; indeed, they disavowed any intention to interfere with the Board's authority where it chose to exercise jurisdiction. But they believed that the unavailability of any remedy, in any forum, was a more serious problem than the absence of total uniformity, particularly since they regarded the Board's refusal to take jurisdiction over controversies as demonstrating that the result would not substantially affect interest of commerce. The advocates of state court jurisdiction emphatically disclaimed any intention to permit the states to intervene in any matter over which the Labor Board was willing to take jurisdiction. Sen Goldwater struck the theme in his opening statement:

"Mr. Goldwater. Mr. President, one of the most important problems which faced the committee was that raised by the existence of the no man's land in labor relations, resulting from a series of decisions by

the Supreme Court. The problem is not a new one. A considerable portion of the 1953 hearings was devoted to the problem of preemption of State law by the Federal statute. During the Senate debate in 1954, my amendment which sought to confer upon the States authority to regulate strikes and picketing was made the first order of business. The bill was recommitted, without taking a vote on my amendment.

"In 1954, we were confronted with Supreme Court decisions, in the *Garner* and other cases, holding that the Federal law had preempted the field, thus striking down State laws on recognition picketing, mass picketing, secondary boycotts, stranger picketing, picketing in the absence of a labor dispute, strike votes, and so forth. At that time the Supreme Court had told us, in its *Garner* decision:

'Congress, in enacting such legislation as we have here, can save alternative or supplemental State remedies by express terms, or by some clear implication if it sees fit.'

"Congress did nothing about the problem in 1954. Now the problem becomes more acute as a result of the decision of the Supreme Court in the *Guss* case.

• • •

"In 1954, we assumed that if a business fell below the Board's standard, the State might handle the dispute. However, in the *Guss* case the Supreme Court held that if interstate commerce was affected, the States might not act, even though the NLRB had declined jurisdiction."<sup>4</sup>

The statements of Senator McClellan, who was the leading spokesman for the Committee minority during the floor

<sup>4</sup> 105 Cong. Rec. 6537-6538, II 1959 Leg. Hist., pp. 1142-1143.

debate in the Senate, reveal the reasoning of those Senators, and demonstrate that they proposed only a very narrow scope for State authority. In describing his amendment, he said in part:

"We have a situation in which people are suffering and there is no recourse to any tribunal, to any law, or any source from which they can get relief.

"Mr. President, I do not propose, by offering the amendment, to detract one iota, or to any degree whatsoever, from the authority which the Board now has, but I simply would require the Board to, by rule or regulation, clarify and define those cases which it feels are not of sufficient importance and do not sufficiently burden or interfere with interstate commerce to warrant its time and its attention.

*"Under the proposed amendment the Board would have to issue a general rule to say, 'This class of cases we will not handle.' Then, in order that those cases not be without a remedy and without a tribunal or source where persons can go for correction or redress from the wrong, I propose they would go to the local courts, where the local courts would have jurisdiction to adjudicate.*

. . .

"If the man goes to his attorney and says, 'I want relief from this situation,' and if the attorney looks at the facts and thereafter says, 'I cannot tell from this state of facts and from the rule which has been promulgated by the Board exactly whether the Board has jurisdiction or whether the State courts have jurisdiction under that rule or under that regulation,' then it is provided, Mr. President, that the matter simply be submitted to the Board, exactly as one would file a complaint. The man would say, 'Here are the facts we need to have adjudicated.'

"The Board within thirty days could either take jurisdiction or decline jurisdiction. If the Board declined jurisdiction, the suit could be brought or the remedy could be sought in the State court or in whatever tribunal might have jurisdiction. If the Board thought it ought to take jurisdiction and that the matter did not come within the rule excluding jurisdiction, then the Board could take jurisdiction and the issue could be settled. The man would get his relief from the Board and his adjudication from the Board."<sup>5</sup>

He then engaged in a colloquy with Sen. Ervin:

"Mr. Ervin. I want to ask the Senator from Arkansas if he does not think it is a disgrace to any system of justice to have people suffering wrongs and not provide them some remedy?

"Mr. McClellan. I have said that. I have said it is almost a national disgrace, in our system of jurisprudence and our philosophy of government, to find that there are people who are suffering wrongs and who have no remedy. We have brought about this situation by the legislation enacted here.

"Mr. Ervin. The amendment of the Senator would provide a remedy for all controversies arising under the Taft-Hartley Act, would it not?

"Mr. McClellan. It would provide for a remedy somewhere—for a tribunal to adjudicate the matters. The National Labor Relations Board would have the first right. That would be a continuing right. The Board could make it exclusive, or it could yield or cede to the State courts the jurisdiction it did not want to take."<sup>6</sup>

Later in the debate, Sen. McClellan also said:

<sup>5</sup> 105 Cong. Rec. 6539, II 1959 Leg. Hist., p. 1144.

<sup>6</sup> 105 Cong. Rec. 6540, II 1959 Leg. Hist., p. 1145.



"We must make up our minds to do one of two things. We can act right now, and we can do it very simply.

"There seems to be opposition on the part of those who favor some kind of provision such as that now in the bill, to the State courts having anything to do with cases in which the Federal Government has an interest, and if that interest is not substantial, why not leave the dispute to the State? If there is enough involved, why not compel the National Labor Relations Board to do its duty, to take jurisdiction, and adjudicate the dispute? It is that simple. *If those who do not want the State courts to have anything to do with it or exercise any responsibility in the matter, or to provide relief where the situation is practically completely local, they should offer a simple amendment to compel the National Labor Relations Board to take jurisdiction of all cases and to adjudicate them.* Perhaps the Board cannot do it. Perhaps it is physically impossible for the Board to do it. However, I will tell the Senate what can be done about it. The Board could be compelled to do it, and Congress could give it the tools with which to do the job."<sup>7</sup>

And, again:

"Thousands upon thousands of businesses and thousands upon thousands of workers are left without a tribunal to adjudicate their grievances, yet we are asked tonight to do nothing about it. We are asked to do nothing about it, or to do worse. Thirty-eight of the States and the Territories have no provision for action and have no law which would enable them to comply with or to function under the language reported by the Committee on Labor and Public Welfare.

<sup>7</sup> 105 Cong. Rec. 6547, II 1959 Leg. Hist., p. 1152, emphasis added.

"Let me point out again that Senators should not be misled by the statement that we are yielding jurisdiction to the States. *We are not yielding anything to the States.* The National Labor Relations Board now has jurisdiction, if it will take it. The Board has the jurisdiction. We have given it to the Board.

"Who is causing the oppression? The National Labor Relations Board. Why? Because we put a burden on it which is impossible to fulfill. Why? *Because we do not want to let the States deal with the little affairs which are primarily their business.*

"Since when have we lost complete confidence in the sovereignty and integrity of the States? It is said that this field is too trifling for the Federal Government to deal with. We have before us the absolute evidence that if the Federal Government undertakes to do the job, it will cost tremendous amounts of money. It will be necessary to establish new boards to do this, and to do that, because it is physically impossible for the National Labor Relations Board to do it all.

"What are we asked to do? We are asked to go through a backdoor process. We are not giving any jurisdiction to the States under the proposal in the bill. What we are doing is trying to beg the States to set up an agency to turn over to the Federal Government, which would have to do things as the Federal Government might direct. I do not think a State which has available the necessary brainpower will do it. I do not think the States will want to do it."<sup>8</sup>

Sen. McClellan's amendment was defeated 39-52 in a roll call vote.<sup>9</sup> Thereafter, the Senate accepted a substitute<sup>10</sup>

<sup>8</sup> 105 Cong. Rec. 6551, II 1959 Leg. Hist., p. 1156, emphasis added.

<sup>9</sup> 105 Cong. Rec. 6552, II 1959 Leg. Hist., p. 1157.

<sup>10</sup> 105 Cong. Rec. 6648, II 1959 Leg. Hist., p. 1174.



for the Committee provision proposed by Sen. Cooper, which became § 701 of S. 1555 as it passed the Senate. (I 1959 Leg. Hist., p. 577.) The Cooper substitute followed the Committee model in permitting only state labor relations agencies (as opposed to courts) to assert jurisdiction, and in requiring the state agencies to follow federal law. The major difference between the Committee and Cooper versions was that the latter did not require an agreement between the NLRB and the state agencies as a condition for the exercise of jurisdiction by the latter.

The scene now shifted to the House. Sen. Goldwater gave testimony before the House Committee on Education and Labor analyzing S. 1555. With respect to § 701, he pointed out as a basic objection that because the vast majority of the states did not have labor relations agencies, additional state legislation would be required before there was any solution to the "no-man's land" problem.<sup>11</sup> He also raised salient procedural objections.<sup>12</sup> He then stated the solution which he favored:

"The minimum necessary and proper solution for the no-man's land problem is to permit the NLRB to decline jurisdiction of cases where the impact on inter-

<sup>11</sup> The portion of his testimony dealing with § 701 is at 105 Cong. Rec. 10104, II 1959 Leg. Hist., p. 1289.

<sup>12</sup> One of these was with respect to the consequence of a refusal by the State agency to issue a complaint:

"Another significant consideration is this. The scope and content of the law under Taft-Hartley is developed not only through the affirmative application of the law by the decisions of the Board and the courts, but by the refusal of the NLRB General Counsel to initiate proceedings, i.e., to issue a complaint in any given case. Such refusal is unreviewable and

state commerce is small or remote but to require the NLRB to set up precise standards for doing so. The States should be authorized to entertain all cases which do not meet these NLRB standards, and either through their courts or appropriate labor agencies, apply their own State law to these cases. *The resulting diversity will occur only with respect to cases that are essentially local in character and hence are the type of cases where uniformity is not only unnecessary but undesirable. Technically being in interstate commerce is no sufficient justification for uniformity.*"<sup>13</sup>

These views did not prevail with the majority of the House Committee who proposed that the NLRB be required to "assert jurisdiction over all labor disputes arising under this Act."<sup>14</sup> A minority of the House Committee,

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final. The only factor making for a consistent set of precedents in these refusals is that the General Counsel, normally, will try to avoid taking contrary or inconsistent positions in similar cases. But under this amendment, State agencies can refuse to issue complaints, and there is nothing in the amendment to require these refusals to be consistent with each other within the particular State, or consistent with refusals in the other States, or most important of all, consistent with the policy of the NLRB General Counsel in refusing to issue complaints. Thus, *the essential attribute of good law—the predictability which enables potential litigants to know their rights as well as the restrictions or limitations under which they must operate*, and the assurance that rules of law will not be arbitrary, is all but destroyed in this area of the law by the amendment." (*Id.*)

Sen. Goldwater also cast doubt on the advisability and constitutionality subjecting the decisions of State agencies to review by federal district courts (*id.*).

<sup>13</sup> *Id.*, emphasis added.

<sup>14</sup> Section 701(a) of H.R. 8342 as reported, I 1959 Leg. Hist., p. 746. The bill would have enlarged the size of the Board and required it to delegate many of its administrative functions to the

however, proposed, as § 701 of H.R. 8400 (the Landrum-Griffin bill), that the Board be empowered to decline to assert jurisdiction "over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction" and that the states be permitted to exercise jurisdiction over all such disputes. Their language was *in haec verba* the same as that of the original Administration bill.<sup>15</sup>

In House floor debate Rep. Landrum returned to the twin themes that the proposals of those who wished to preserve absolute uniformity were no solutions at all, and that under the Landrum-Griffin response the state courts would have jurisdiction only where the Board has surrendered it because of the dispute's limited effect on commerce.<sup>16</sup>

General Counsel. (See H. Rep. No. 741 on H.R. 8342, pp. 17-19, I 1959 Leg. Hist., pp. 775-777.)

<sup>15</sup> I 1959 Leg. Hist., p. 677. Compare § 502 of S. 748, *id.* at 141. The sole difference was that S. 748 would have created a new § 6(b) of the Act whereas H.R. 8400 proposed a new § 14(c).

<sup>16</sup> After stating the problem Mr. Landrum continued:

"What do we do? We recognize, as the gentlemen in the other body recognized, that something had to be done. The Senate Bill provided: We will permit State agencies other than courts to handle it. But we find that only 10 of the now 50 States have State agencies, leaving about 40 States without any forum and still with a no man's land.

"So, what do we do? The committee says 'No' to the decisions of the courts. The committee says 'No' to the decisions of the National Labor Relations Board, and the committee says You shall take jurisdiction of all labor disputes, thereby bringing about complete federalization of all labor complaints, regardless of how trivial or how small the effect on interstate commerce. What do we say? We say we recognize the National Labor Relations Board decision not to go below that cut-off

The Landrum-Griffin bill, including its state court solution of the "no-man's land" problem was substituted for the Committee bill and passed the House. (105 Cong. Rec. 15859-15860, 15890-15892, II 1959 Leg. Hist., pp. 1691-1692, 1701-1702.)

The Committee on Conference adopted the House bill on this point, with a single exception: the Committee-added a proviso "that the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959." In reporting to the Senate as Chairman of the Conferees, Sen. Kennedy said of this compromise:

"No-man's land: The Senate conferees insisted upon an amendment which prevents the NLRB from declining to exercise its existing jurisdiction and thereby depriving both employers and employees of the protection of the National Labor Relations Act. The Landrum-Griffin bill would have allowed the Board to surrender unlimited jurisdiction to the States, 35 of which provide no protection to the rights to organize

line and we say that State agencies, including State courts—State courts, that is all we say—shall have the right to hear these complaints where the effect on interstate commerce is trivial. That is all there is to the no man's land. We give them a place to go to get relief." 105 Cong. Rec. 15519, II 1959 Leg. Hist., 1555.

See also the remarks of Rep. Dixon of Utah, 105 Cong. Rec. 15546-15547, II 1959 Leg. Hist., pp. 1582-1583, culminating in the following:

"The Griffin-Landrum bill is a step, if a very small one, in the right direction by restoring to the States jurisdiction in labor relations cases only where the NLRB declines jurisdiction. This is a modest offering to the States, but let us at least go that far."



and bargain collectively. The conference report prevents further cession. The current standards of the NLRB assure the widest effective exercise of Federal jurisdiction in the history of the National Labor Relations Act." (105 Cong. Rec. 17898, II 1959 Leg. Hist., p. 1431.)

Sen. Kennedy also engaged in a significant colloquy with Sen. Carroll:

"Mr. Carroll. . . . [F]or the first time—we begin to soften the so-called doctrine of preemption; and we say to the National Labor Relations Board, 'We, the Congress, specify that you must assume jurisdiction of this area.'

"Is not that so?

"Mr. Kennedy. I would state it somewhat differently. As the Senator from Colorado knows, the National Labor Relations Board has not assumed jurisdiction over quite a considerable area of American interstate commerce, for 25 years, because of the manpower problems which would be involved if the Board took jurisdiction over numerous cases which do not have a very substantial effect on interstate commerce.

"In 1959 the Board published jurisdictional standards which, as the Senator has said, resulted in the Board's assuming more jurisdiction over interstate commerce than the Board ever before in its history had assumed. But those not now covered by the jurisdictional standards of the National Labor Relations Board have never been included in its jurisdiction.

"[W]e [have] provided that the States could assume jurisdiction in that area; but we made sure that the Board would not reverse itself and reject cases over which it now assumes jurisdiction.

"The Board can change its jurisdictional standards, and can, at any time, assume more jurisdiction; but it cannot assume less jurisdiction than it does today.

"Once again, we arrived at a compromise; and I would say that, very definitely, it is a satisfactory one, all in all."<sup>17</sup>

And, Sen. Goldwater, whose views had prevailed except for the addition of the proviso, again assured his Senate colleagues:

"Mr. Président, judging from the colloquy I have heard today on the no man's land, we must keep this in mind. Up until 2 years ago, when the Guss decision was handed down by the Supreme Court, we had no such thing as a no man's land. The State courts were taking care of these cases, and there was no problem in the field. So we are not trying something new, Mr. President; we are merely going back to that which was

<sup>17</sup> 105 Cong. Rec. 17902, II 1959 Leg. Hist. 1435. Sen. Kennedy reiterated (*id.*):

"If the 35 States which do not now have State labor agencies which can handle representation proceedings, and so on, determine that the atmosphere of the country is such that punitive legislation is wanted as regards these employees and employers who are engaged in interstate commerce, but who in a sense are being turned over by the Federal Government to the States—if those States feel that this provision is going to serve as an excuse for the passage of laws which would deny them what both the Senate and the House of Representatives, I am sure, would feel would be their rights, then there are several remedies. The first is by having the National Labor Relations Board broaden its jurisdiction—which can be done under our bill. The second is by having the President recommend the reorganization of the Board, so it can handle these cases. The third is by having the Congress make it very clear that the Board must assume its full jurisdiction."



in effect all the years we have had labor law up until 1957, when the Guss decision of the Supreme Court preempted the State area.

I think my colleagues fear rather wrongly in this direction. To me this is one of the most important recommendations of the McClellan committee, in that it will give relief to the small businessmen. Those are the people about whom we are concerned. *We are not interested in State court action in cases which apply to interstate commerce, because it is clear those are involved in interstate commerce and it is clear the NLRB must take jurisdiction.* I am talking about the little grocery store, the service station, or the main street merchant who cannot get relief from the NLRB but who will now be able to get relief from the local and State courts." (105 Cong. Rec. 17904, II 1959 Leg. Hist., p. 1437, emphasis added.)<sup>18</sup>

<sup>18</sup> This tracks his earlier statement to the Senate during the debate on S. 1555 in that body:

"The cases about which we are talking, the ones with which I am concerned—and I am sure other Senators who have discussed this matter are concerned with them—are obviously cases which are so small that the NLRB will not assume jurisdiction. We who are interested in the 'no-man's land' situation have no idea in the world that the 'no-man's land' action would enter into industry-wide bargaining or into plants of 200, 300, 500, 1,000, or more employees, where interstate commerce is clearly affected.

"Our only concern is for the little man who is operating a garage and who has 5 or 10 employees or for a man like Coffey, who had 10 or 12 truckdrivers; or a small merchant on Main Street, who might have 20 employees. From the very nature and size of the business, I feel certain the NLRB would immediately say it was not interested in such a case. I think we lose sight of that situation.

"I hope Senators do not believe for 1 minute I think that

The common understanding and expectation that the Labor Board's jurisdiction would be exclusive in labor disputes over which it would assert jurisdiction is tellingly confirmed by Sen. Mundt's reaction to the *Garmon* decision itself. *Garmon* was decided on April 20, 1959. The Senate debate, which we have just discussed, on the no man's land problem, took place on April 23 and April 24. The next amendment offered after the adoption of the Cooper substitute, see p. 14, *supra*, was one by Sen. McClellan which, among other things, would have severely limited organizational and recognitional picketing.<sup>19</sup> One of the supporters of this McClellan amendment was Sen. Mundt. He described a case of recognition picketing in which the employer had brought an action in the South Dakota courts and obtained a judgment in excess of \$25,000 of which \$20,000 were punitive damages awarded by the jury. Sen. Mundt continued:

"The judgment was unanimously affirmed by the Supreme Court of South Dakota. It is now on appeal to the Supreme Court of the United States.

"Following Monday's decision in the *Garmon* case, it may well be that the contractor's case will be reversed by the Supreme Court, because in that decision the Supreme Court held that State courts had no right to award damages to a contractor who had been ruined and forced out of business if the picketing was peace-

*by providing this kind of relief at the State level I am trying to get the States into matters which are purely interstate commerce, because I am not.*" (105 Cong. Rec. 6641, II 1959 Leg. Hist., p. 1167.)

See also remarks of Sen. Allott at 105 Cong. Rec. 6541 and 6544, II 1959 Leg. Hist., pp. 1146 and 1149.

<sup>19</sup> 105 Cong. Rec. 6646-6647, II 1959 Leg. Hist., pp. 1174-1175. A much revised version regulating this subject was ultimately enacted as § 8(b)(7).

ful, and that the only time the State has jurisdiction is when there is a criminal violation."<sup>20</sup>

In short, those who objected to the *results* of federal preemption of state law attempted to change federal substantive law which the Labor Board would be charged with enforcing; they did not propose that State law be permitted to govern in cases where the Labor Board exerted jurisdiction, or that the states be permitted to exercise concurrent jurisdiction.

**B.** We are now in a position to see how Congress' enactment of § 14(c) as a solution to the "no-man's land" problem constitutes Congressional ratification of the *Garner-Garmon* principle.

First, the very existence of the problem, the various proposed solutions, and the ultimate legislative compromise are understandable only against the background of a universally shared starting point that absent new legislation the state courts could not take jurisdiction over conduct which might be protected or prohibited by the NLRA (except in cases of violence). If the state courts could have considered conduct which the NLRB might also have determined to be an unfair labor practice within its jurisdiction there would have been no no-man's land. And, the various proposals (two of which, the Senate Committee bill and the Cooper substitute, were exceedingly intricate) for preserving uniformity, and keeping the state *courts* out of labor disputes within the NLRB's range of competence entirely, would have been completely beside the point if the NLRA

<sup>20</sup> 105 Cong. Rec. 6652, II 1959 Leg. Hist., p. 1180. Sen. Mundt's prophecy was fulfilled in *DeVries v. Baumgartner's Electric Construction Co.*, 359 U.S. 498.

had left the state courts any concurrent jurisdiction (except over violence).

Second, the sole intention of the proponents of state court jurisdiction was to permit the states to consider cases whose merits the Board would not even consider; there was no intention to grant the state courts concurrent jurisdiction with that of the Board or otherwise to provide duplicate remedies. Their point was that in the absence of NLRB enforcement of federal law they wished to allow state law to operate, and to be administered by state courts; they did not, however, propose that state law would be operative where the Board, by retaining or asserting jurisdiction, makes a federal forum and federal law available. As we have seen, pp. 8-17 *supra*, they buttressed that point by arguing that the very declination of jurisdiction because the commerce guidelines were not met was a determination by the Board that the dispute was of insufficient impact on commerce to require, or even to warrant, uniformity. Indeed, to provide alternative state and federal forums, applying different standards in the same labor dispute, would have defeated their purpose, unmistakably express in the House Committee Report Dissenting Views: "The need today is to reestablish clear lines of authority between the Federal Government and the States."<sup>21</sup>

Third, the enactment of § 14(c) is a striking example of the process of "conflict and compromise between strong contending forces" described by Mr. Justice Frankfurter in *Carpenters' Union v. Labor Board*, 357 U.S. 93, 99-100, and likewise "counsels wariness in finding by construction

<sup>21</sup> H. Rep. No. 741 on H.R. 8342, p. 97, I 1959 Leg. Hist., p. 855, reprinted in full at pp. 14-15, *supra*.



a broad policy" in favor of state court jurisdiction. It is clear that the Senate minority and House majority could not have achieved a legislative overruling of *Garner* and *Garmon*, in addition to that of *Guss*, if they had thought that additional step desirable. And, as we have seen, they did not at any point even profess such a thought. For, to obtain legislation to give the state courts jurisdiction over controversies which the Board refused to handle, so that no forum was available, the advocates of state court jurisdiction were compelled to agree that the class of cases potentially subject to NLRB jurisdiction be frozen at the August 1, 1959 level—at the highest level in the history of the Act.

Prof. Cox, who was Sen. Kennedy's advisor during consideration of the 1959 amendments, described the effect of the proviso which was adopted by the Conference Report as follows:

"This proviso writes at least ninety per cent of the Senate philosophy into the NLRA. The NLRB standards on August 1, 1959, embraced the widest jurisdiction in its history. They go far beyond the 1954 yardsticks and substantially beyond 1950 standards. Under this amendment, therefore, labor unions enjoy greater protection for organizational activities and management greater protection against union unfair practices than was available on any occasion prior to October, 1958. *Within this area, the existing doctrines of federal pre-emption are impliedly preserved.*"<sup>22</sup>

<sup>22</sup> Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 Minn. L. Rev. 257, 262, footnote omitted, emphasis added.

Prof. Cox may have modified these views when he returned to the subject in an article (discussed at pp. 4-5 and n. 3, *supra*) wherein he criticizes *Lockridge*:

The enactment of Titles I-VI of the LMRDA, which for the first time imposes federal regulation on the internal affairs of unions and which contains anti-preemption provisions in §§ 103, 603 and 604 does not detract from the foregoing analysis; it, indeed, tends to reinforce it. Congress did not, when it regulated internal union affairs, write on a clean slate, as it did when it first regulated collective bargaining and gave statutory support to the right

"The final reason given by the majority in *Lockridge* for adhering to the 'arguably protected or prohibited' rule was that Congress has by inaction given it tacit approval. Congress was aware of the broad scope of the Court's preemption rulings when it reviewed the federal labor legislation in 1959. The lack of support for amendments reversing the rules except in areas over which the NLRB declined jurisdiction may be understood to indicate acquiescence in their general thrust. But it presses the inference too far to conclude that Congress approved the doctrinal rationale and every particular application. It is equally unrealistic to look to Congress for particular changes in this branch of labor law. Changes in the law of strikes and picketing are always controversial; any such bill would open up a much wider field of controversy. Congress seems able to enact legislation dealing with labor-management relations only in response to a strong swell of public opinion. Although sweeping reversal of precedent turning broad jurisdiction back to the state would run counter to the indications of legislative ratification of preemption as well as to stare decisis, neither should bar further refinement of the judicial analysis effectuating the basic legislative purpose." (Cox, *Labor Law Pre-emption Revisited*, *supra*, 85 Harv. L. Rev. at 1376-1377.)

While the "further refinement" of *Garmon* which Prof. Cox suggested would not change the result in this case (see p. 5 *supra*) we must respectfully disagree with his assessment of the proper relationship between judicial precedent and Congressional action.

The 1959 legislative history shows that Congress does indeed legislate with considerable particularity "in this branch of labor law" (85 Harv. L. Rev. at 1377). Congress is fully aware that in labor



to organize and to bargain collectively; rather, Titles I-VI supplement a preexisting body of state law which protects members' rights. The legislative history quite clearly shows that the anti-preemption provisions were included in order to preserve those state created rights. Moreover, § 603(b) establishes that Titles I-VI were not intended to affect any rights or obligations under the NLRA; thus, it stands for the proposition that regulation of membership rights, and the NLRA's regulation of a member's job rights, are to be treated as distinct subjects (even as they were under the *Gonzales* case). It would not accord with this judgment to construe the NLRA differently because Titles I-VI were adopted.

If, nevertheless, one could look to those Titles, it would teach mainly that Congress was quite able to write anti-preemption language when it chose to do so, and that the

legislation as much as in any other field, it must make nice judgments concerning the extent to which individual state judgments will be tolerated. (Compare also § 14(a), which forbids states from interfering with the employer's judgment as to whether his supervisors shall be members of unions (*Beasley v. Food Fair of North Carolina*, 416 U.S. 653), with § 14(b) wherein Congress "decided to suffer a medley of attitudes and philosophies on the subject" (*Retail Clerks v. Schermerhorn*, 375 U.S. 96, 105). "The purpose of Congress is the ultimate touchstone." (*Id.* at 103.)

More fundamentally, the decision whether to enact legislation or not, is itself a matter of high legislative policy. If Congress is able to enact labor-management legislation "only in response to a strong swell of public opinion," this is because under other circumstances the political equilibrium is in balance. It is not the judicial function to step into the breach and, by overruling considered interpretations and to adopt a new rule which none of the "strong contending forces" has had the political power to enact into law. See *Carpenters' Union v. Labor Board*, *supra*, 357 U.S. at 99-100, quoted at pp. 23-24 *supra*.

absence of anything like §§ 103, 603, and 604 in Title VII confirms our interpretation of the implications of § 14(c).<sup>23</sup>

There is a broader, more general lesson to be drawn from the Congressional effort to deal with the "no-man's land" problem and its ultimate solution. This is that by its nature the problem of allocating competence is a legislative task, not a judicial one. In *Guss*, a majority of the Court determined "that the [cession] proviso to § 10(a) is the exclusive

<sup>23</sup> One commentator has read Justice White's dissenting opinion in *Lockridge* as "strongly suggest[ing] that the savings clauses of the LMRDA actually cut back on the preemptive force of the LMRA." (Bryson, *A Matter of Wooden Logic: Labor Law Preemption and Individual Rights*, 51 Tex. L. Rev. 1037, 1054.) Whether or not that reading is accurate, the commentator's understanding of the legislative history is, we believe, entirely correct:

"The savings clauses, however, did not roll back *Garmon* in union-member cases, or extend *Gonzales*. They simply made certain that the *Garmon* logic would not be applied to the LMRDA, a less comprehensive and more cautious statute.

The legislative history of the LMRDA supports a more conservative construction. In the course of debate over the Landrum-Griffin Bill, Senator John F. Kennedy had objected that the Bill was unnecessary, because state law already supplied adequate protections for members against their unions. In some cases, he pointed out, the state law protections were even superior to the federal proposals, and the preemptive effect of the federal act would wipe out those enlightened state law provisions. The sponsors of the Bill deftly slipped around Kennedy's objections by inserting the antipreemption clauses, suggesting that where the state law was better, the union member would have his choice. The clauses indicate that Congress regarded union-member disputes in a different light from union-employer disputes. But it reads too much into the savings clauses to suggest, as Justice White did, that they 'preserve state remedies' against both the LMRDA and the LMRA." (*Id.*)

means whereby States may be enabled to act concerning the matters which Congress has entrusted to the National Labor Relations Board." (353 U.S. at 9.) This view was based not on this Court's view of policy, but its understanding of that proviso, in light of its background, particularly its source in suggestions in the opinions in *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330, U.S. 767. (See 353 U.S. at 7-10.)<sup>24</sup> The very complexity of the problem which led to presentation at different stages of the legislative process of several alternatives just by those whose principal objective was to preserve the universality of federal law, and the exclusivity of *administrative* decision, shows that only Congress and not this Court could adequately deal with the problem. Most important of all, in this connection, is the actual compromise which was reached: for while this Court could have determined, either by deciding *Guss* the other way originally, or by overruling it there-

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<sup>24</sup> With all respect we do not believe that "the reaction to *Guss* indicates that this Court was quite wrong in determining that the non-man's land was justified in the name of congressional intent to achieve uniformity in law and administration." (*Lockridge, supra*, 403 U.S. at 309, 316 (White, J. dissenting).) We have found no statement in the legislative history by any member of Congress disagreeing with the reasoning of *Guss*, that is to say, the opinion's understanding that the § 10(a) proviso established the intent of the 1947 Congress. (The *Bethlehem Steel case, supra*, was apparently not even mentioned in the debates, see I 1959 Leg. Hist., p. xiii.) Rather, the need for a new legislative solution was the product of experience, particularly the states' failure to enter into cession agreements authorized by § 10(a), and the number of cases over which the Board declined to take jurisdiction, which was due in part to its vastly increasing case load and in part to a change in philosophy. (See *Breeding Transfer Co.*, 110 NLRB 493 and related cases decided Oct. 26, 1954.)

after, that the state courts should have jurisdiction wherever the Board declined on commerce grounds to exercise it, the Court could not, on any basis other than pure fiat have required the Board to entertain all disputes over which it would have asserted jurisdiction on August 1, 1959, or any other given date.

The "no-man's land" problem thus teaches that if *Garmon* creates serious injustice (as petitioner contends but which we do not believe), or if that doctrine is contrary to the current Congressional view as to the proper allocation of authority between the federal government and the states, Congress is able to act, and can do so in a manner which far more precisely reflects the accommodation of competing policy considerations than the decision of any court.

Petitioner asserts, without demonstrating, that reversal of *Garmon* "would correct the serious injustices which occur under present law." (Pet. Br. 118.) We submit that Congress has determined what is "justice" among the parties in labor disputes arising out of interstate commerce. Because the line between the just and the unjust depends so often on the determination of what actually happened, and because Congress believed that only a single expert national agency could be relied upon to assess the facts accurately in this often complex field, Congress determined that justice should be administered exclusively by the NLRB. Moreover, Congress itself determined what remedies are "just" for violations of the standards of conduct which it established, while granting to the Board the authority to develop other remedies within prescribed limits which would effectuate "justice" in the broadest sense—"to effectuate the purposes of the Act" which is the measure of justice in this



field. In petitioner's case the claim that important rights are being sacrificed (Pet. Br. 124-125) has a particularly hollow ring. As the Court of Appeal said:

"We presume that the N.L.R.B. would have correctly decided the additional matters and would have granted the relief, if any, to which Hill was legally entitled if Hill had pursued the matter further before the N.L.R.B. But Hill was apparently dissatisfied with the award of \$2,517 from the N.L.R.B. and sought the more generous bounties of a common law jury." (Pet. A-23.)

One final word remains to be said. Petitioner's suggestion that *Garmon* should be abandoned in favor of *Morton*<sup>25</sup> because this would, whenever a preemption issue is raised, "require an examination of policy consideration, such as characterized the pre-*Garmon* decisions" (Pet. Br. 122) ignores the "truism that it is the business of Congress to declare policy and not this Court's" (*Carpenters' Union v. Labor Board*, *supra*, 357 U.S. at 100; see also *Machinists v. Labor Board*, 362 U.S. 411, 428.) The *Garmon* decision rests, at bottom, on a full appreciation of, and effectuates, that truism. Mr. Justice Frankfurter had high "regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy . . ." (*Garmon*, 359 U.S. at 243),<sup>26</sup> but he was equally conscious

<sup>25</sup> There is, of course, no inconsistency between *Garmon* and *Morton* (see Resp. Br. pp. 70-73), and both point to the same result here (*id.* at 73-77). In short, "federal law pre-empts state remedies that interfere with federal labor policy or with specific provisions of the NLRA." *Connell Co. v. Plumbers & Steamfitters*, 421 U.S. 616, 635.

<sup>26</sup> Justice Frankfurter had dissented in some of the major substantive supercession cases under the NLRA—*Hill v. Florida*, 325

of this Court's duty to implement Congressional policy embodied in legislation which was a valid exercise of the commerce power. And, he understood the true import of Congress' establishment of a national labor policy, and of its grant of jurisdiction to administer that policy to a single agency, the NLRB. It is that understanding which is at the heart of the *Garmon* doctrine, even as it informed *Garmon's* immediate antecedents, the unanimous decisions in *Garner*, in which he joined, and in *Weber v. Anheuser-Busch*, 348 U.S. 468, which he too wrote:

"Administration is more than a means of regulation; administration is regulation. We have been concerned with conflict in its broadest sense; conflict with a complex and interrelated federal scheme of law, remedy, and administration. Thus, judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted." (*Garmon*, 359 U.S. at 243.)

## II

To the extent he does not attack *Garmon*, petitioner argues that the conduct that is the crux of this case—the alleged discrimination in job referrals predicated on his union activities—is a peripheral concern of the federal labor policy and can therefore be concurrently regulated through state tort laws. But, as we now show, there can be no doubt that Congress intended federal law to state the sole measure of what constitutes unlawful job discrimination based on union membership or activity.

Congress' purpose in 1935 was, in the words of § 1 of the U.S. 538, 547; *Bus Employees v. Wisconsin Board*, 340 U.S. 383, 400; and even (alone) in *Mine Workers v. Arkansas Oak Flooring Co.*, 351 U.S. 62, 76. He had been in the majority in every case in which state jurisdiction was sustained.



Wagner Act, to "encourag[e] the practice and procedure of collective bargaining." In another society that purpose could perhaps have been achieved without incorporating a statutory protection for the right to "form, join and assist labor organizations"—such as § 7—or without incorporating, as one of the five employer practices made unlawful, a statutory prohibition against employer misuse of the power to hire and fire as a means to encourage certain favored forms of union activity or to discourage disfavored union activity—such as § 8(a)(3). But Congress concluded that prior experience demonstrated that it was not possible to do so in this country. In another society, less dedicated to private enterprise and minimal government intervention in business management, that purpose could have been taken to require an absolute prohibition against employer action that disadvantaged employees who engage in union activity, that is, a prohibition on all activity that has certain "consequences," like the discrimination prohibition eventually enacted in Title VII of the Civil Rights Act of 1964. (See *Griggs v. Duke Power Co.*, 401 U.S. 424, 432.) But, the 1935 Congress regarded that as too far reaching an incursion into business affairs. Instead, a delicate balance was struck between protecting the right to engage in union activity and the right to manage. And, the legislative background to § 8(a)(3) of the Act leaves no doubt that these interests were balanced by forbidding employment discrimination whose purpose is to discourage or encourage union membership.

The Senate Report stated:

"Of course nothing in the bill prevents an employer from discharging a man for incompetence; from advancing him for special aptitude; or from demoting

him for failure to perform. But if the right to be free from employer interference in self organization or to join or refrain from joining a labor organization is to have any practical meaning, it must be accompanied by assurance that its exercise will not result in discriminatory treatment or loss of the opportunity for work." S.Rep. No. 573 on S.1958, 74th Cong., 1st Sess., p. 11.)

To the same effect was the view of Senator Walsh:

"\* \* \* The employer has the economic power; he can discharge any employee or any group of employees when their only offense may be to seek to form a legitimate organization among the workers for the purpose of collective bargaining. This bill declares that is wrong. It declares that the employee has the right to engage in collective bargaining, and it says, 'Mr. Employer, you must keep your hands off; you shall not use that effective power of dismissal from employment which you have and destroy the organization of the employees by the dismissal of one or more of your employees when they are objectionable on no other ground than that they belong to or have organized a labor union.'" (79 Cong. Rec. 7658.)

In *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 147, 182-187, Mr. Justice Frankfurter explained both the background and the nature of the Congressional response:

"The denial of jobs to men because of union affiliations is an old and familiar aspect of American industrial relations. \* \* \*

"The Act,' this Court has said, 'does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them.' But 'under cover of that right,' the employers may not 'intimidate or coerce its employees with respect to their self-organization and representation.'"

"It is [therefore] no longer disputed that workers

cannot be dismissed from employment because of their union affiliations. Is the national interest in industrial peace less affected by discrimination against union activity when men are hired? The contrary is overwhelmingly attested by the long history of industrial conflicts, the diagnosis of their causes by official investigations, the conviction of public men, industrialists and scholars.

• • •  
 "Discrimination against union labor in the hiring of men is a dam to self-organization at the source of supply. The effect of such discrimination is not confined to the actual denial of employment; it inevitably operates against the whole idea of the legitimacy of organization. In a word, it undermines the principle which, as we have seen, is recognized as basic to the attainment of industrial peace.

• • •  
 "We have seen the close link between a bar to employment because of union affiliation and the opportunities of labor organizations to exist and to prosper. Such an embargo against employment of union labor was notoriously one of the chief obstructions to collective bargaining through self-organization. *Indisputably the removal of such obstructions was the driving force behind the enactment of the National Labor Relations Act.*

• • •  
 "The natural construction which the text, the legislative setting and the function of the statute command, does not impose an obligation on the employer to favor union members in hiring employees. He is as free to hire as he is to discharge employees. The statute does not touch 'the normal exercise of the right of the employer to select its employees or to discharge them'. It is directed solely against the abuse of that right by interfering with the countervailing right of self-organization." (Footnotes omitted, emphasis added.)

The two sides to § 8(a)(3)—prohibition against discrimi-

nation on the basis of union activity and preservation of the right to discharge for non-union related reasons—are synthesized in *American Ship Bldg. v. Labor Board*, 380 U.S. 300, 311:

"Section 8(a)(3) prohibits discrimination in regard to tenure or other conditions of employment to discourage union membership. Under the words of the statute there must be both discrimination and a resulting discouragement of union membership. It has long been established that a finding of violation under this section will normally turn on the employer's motivation. See *Labor Board v. Brown*, [380 U.S. at] 278; *Radio Officers' Union v. Labor Board*, 347 U.S. 17, 43; *Labor Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 46. Thus when the employer discharges a union leader who has broken shop rules, the problem posed is to determine whether the employer has acted purely in disinterested defense of shop discipline or has sought to damage employee organization. It is likely that the discharge will naturally tend to discourage union membership in both cases, because of the loss of union leadership and the employees' suspicion of the employer's true intention. But we have consistently construed the section to leave unscathed a wide range of employer actions taken to serve legitimate business interests in some significant fashion, even though the act committed may tend to discourage union membership. See, e. g., *Labor Board v. Mackay Radio & Telegraph Co.*, 304 U.S. 333, 347. Such a construction of § 8(a)(3) is essential if due protection is to be accorded the employer's right to manage his enterprise. See *Textile Workers v. Darlington Mfg. Co.*, [380 U.S. at] 263."

It is therefore beyond dispute that central to the national labor policy is the even-handed enforcement of § 8(a)(3)'s prohibition against employment discrimination whose pur-



pose is to encourage or discourage participation in union activities. And, as this Court recognized from the first, that prohibition is not limited to actions by anti-union employers against (or in favor of) union members—it was intended also to encompass action by such employers predicated on the scope and intensity of the member's commitment to the union cause:

“The Board found \* \* \* that, in taking back six of the eleven men and excluding five who were active union men, the respondent [employer's officials discriminated against the latter on account of their union activities and that the excuse given that they did not apply until after the quota was full was an afterthought and not the true reason for the discrimination against them. As we have said, the respondent was not bound to displace men hired to take the strikers' places in order to provide positions for them. It might have refused reinstatement on the grounds of skill or ability but the Board found that it did not do so. It might have resorted to any one of a number of methods of determining which of its striking employees would have to wait because five men had taken permanent positions during the strike but it is found that the preparation and use of the list, and the action taken by respondent, was with the purpose to discriminate against those most active in the union. There is evidence to support these findings.” (*Labor Board v. Mackay Radio Corp.*, 304 U.S. 333, 347.)

Section 8(b)(2) is the precise parallel of § 8(a)(3) which it incorporates by reference. It is for that reason that the 1935 legislative history set out at pp. 32-33, *supra*, was quoted by Mr. Justice Harlan in his concurring opinion in *Teamsters Union v. Labor Board*, 365 U.S. 667, 682-683, and why the Court's opinion in that case (which he joined) analyzed

the question whether the operation of the hiring hall there violated § 8(b)(2) in terms of the “true purpose” or “real motive” test established in § 8(a)(3):

“There being no express ban of hiring halls in any provisions of the Act, those who add one, whether it be the Board or the courts, engage in a legislative act. The Act deals with discrimination either by the employers or unions that encourages or discourages union membership. As respects § 8(a)(3) we said in *Radio Officers v. Labor Board*, 347 U.S. 17, 42, 43:

‘The language of § 8(a)(3) is not ambiguous. The unfair labor practice is for an employer to encourage or discourage membership by means of discrimination. Thus this section does not outlaw all encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination is prohibited. Nor does this section outlaw discrimination in employment as such; only such discrimination as encourages or discourages membership in a labor organization is proscribed.’

“It is the ‘true purpose’ or ‘real motive’ in hiring or firing that constitutes the test. *Id.* 347 U.S. 43.

• • •

“It may be that hiring halls need more regulation than the Act presently affords. As we have seen, the Act aims at every practice, act, source or institution which in fact is used to encourage and discourage union membership by discrimination in regard to hire or tenure, term or condition of employment. Perhaps the conditions which the Board attaches to hiring-hall arrangements will in time appeal to the Congress. Yet where Congress has adopted a selective system for dealing with evils, the Board is confined to that system. *NLRB v. Drivers, Chauffeurs, Helpers, etc.*, 362 U.S. 274, 284-290. Where, as here, Congress has aimed its sanctions



*only at specific discriminatory practices, the Board cannot go farther and establish a broader, more pervasive regulatory scheme.*" (365 U.S. at 674-675, footnote omitted, emphasis added.)

Thus, the Board error corrected in *Teamsters Union* was the failure to understand that the 1947 Congress left to unions as much (and no more) freedom in running a hiring hall as the 1935 Congress left to the employer at the hiring gate. The policy of the NLRA as amended by the Taft-Hartley Act is that to the extent a union exercises the effective power to hire and fire it should be subject to *precisely* the same legal inhibitions as an employer. And, as this Court emphasized in *Radio Officers v. Labor Board*, 347 U.S. 17, § 8(b)(2), of course, follows § 8(a)(3) in that the former protects members who *actively* oppose union officers and policies from union-caused job discrimination, just as the latter protects union members who *actively* oppose the employer's policies from employer-caused job discrimination:

"The policy of the Act is to insulate employees' jobs from their organizational rights [citing § 7 of the Act]. Thus §§ 8(a)(3) and 8(b)(2) were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood." (347 U.S. at 39-40, footnotes omitted.)

For, as § 7 establishes by its very terms,<sup>27</sup> Congress takes a very broad view of the "organizational rights" which the

<sup>27</sup> "Employees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain

Act protects. Congress could in 1947 have determined to protect only non-members against union action, leaving all controversies between unions and their own members to state law. But as *Radio Officers* squarely holds, that was not the choice Congress made. (See also the discussion at Res. Br. 47-48.) Instead, as Mr. Justice Rehnquist stated in *NLRB v. Boeing Co.*, 412 U.S. 67, 74-75, "Congress intended to distinguish between the external and the internal enforcement of union rules, and \* \* \* therefore [granted] the Board \* \* \* authority to pass on those rules affecting an individual's employment status but not on his union membership status."

In sum, the precedents teach that as of 1935 Congress occupied the field of employer discrimination on the basis of union membership or activity — and, as of 1947, union causation of or attempts to cause such discrimination — in its entirety; no gap is left to be filled by state regulation in any form or guise. Thus, for a state to establish an automatic "effects" test holding union action which causes an employer's discharge of, or failure to hire, an employee to be illegal whenever it has an adverse effect on organization, although the discharge would be sanctioned by the Board under the "true purpose" test, would be to interfere with the Congressional will. By the same token, for a state to establish such a test for union refusals to refer union members opposed to the union's officers or policies would constitute an impermissible intrusion into the federal domain. In the latter case, the states action would be indistinguishable

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from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)" (Emphasis added)

from the state prohibition against a concerted refusal to engage in overtime struck down in *Machinists Union v. Wisc. Emp. Rel. Board*, *supra*, 44 U.S.L.W. 5026, or the more expansive view of illegal secondary pressure than that of § 8(b)(4) struck down in *Morton*, *supra*, 377 U.S. at 258-260.

The potential for such conflicts between federal and state law, absent *Garmon*, was aptly described in an article on which petitioner places heavy reliance:<sup>28</sup>

“Approval of the state court judgment in *Borden* would have proved disastrous for the uniform regulation of hiring halls approved in the *Local 357* case. Under the state rule a union member could bring virtually any suit against his union in state court, even if the conduct was clearly within the Board’s unfair labor practice jurisdiction and the Board was fully capable of remedying the wrong.

“Union conduct on all fours with the *Local 357* case would be no more secure from state prohibition than murder on the picket line. Instead of preserving the national standard for hiring hall regulation, with the focus on union discrimination, the Court would have sanctioned the development of a maze of different regulatory schemes, with the focus on implied contract rights. Board approval of certain hiring hall procedures would be feckless if state law held that those procedures violated rights implicit in the contractual relationship between member and union.

“Congress’ close regulation of hiring halls strongly suggests that state law invasions of this federal domain should be discouraged. Moreover, the conflict between

<sup>28</sup> Bryson, *A Matter of Wooden Logic: Labor Law Preemption and Individual Rights*, *supra*, 51 Tex. L. Rev. 1037.

state contract law and federal proscriptions against discrimination pits not only two lawmaking bodies and two tribunals, but two entirely different types of law against one another. Preemption should help prevent precisely this kind of conflict. Individual rights under state law should give way here, at least in actions for damages. In the terms *Garmon* used to characterize the *Gonzales* exception, the hiring hall is simply not a ‘peripheral concern’ of national labor relations legislation.”<sup>29</sup>

### CONCLUSION

For the foregoing reasons, and those stated in the brief for respondents, the judgment of the Court of Appeal of California should be affirmed.

Respectfully submitted,

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<sup>29</sup> *Id.* at 1054.